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# New York Civil Practice

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# NEW YORK CIVIL PRACTICE

Jay C. Carlisle†

I. INTRODUCTION .....	345
II. NEW LEGISLATION .....	347
A. <i>New York General Municipal Law</i> .....	347
B. <i>Wrongful Death Actions</i> .....	348
C. <i>Court of Claims Procedure</i> .....	349
D. <i>Default Judgment</i> .....	349
E. <i>CPLR 217</i> .....	350
F. <i>Forfeiture Laws</i> .....	350
G. <i>Additional Items</i> .....	350
H. <i>Judicial Improvements Act of 1990</i> .....	351
III. SUBJECT MATTER JURISDICTION .....	353
IV. PERSONAL JURISDICTION .....	355
A. <i>Constitutional Limitations on In Personam</i> <i>Jurisdiction</i> .....	355
1. <i>Parts II-A, II-B, and II-C</i> .....	356

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The 1991 article on New York Civil Practice is dedicated to Evans V. Brewster in honor of his seventeen years of outstanding service as the Surrogate of Westchester County.

Judge Brewster is a former member of the White Plains Common Council and the Westchester County Board of Supervisors. He also is a past president of the Westchester County Bar Association and was a distinguished family court and county court judge prior to his election as Surrogate in 1973. Judge Brewster has earned the respect and affection of the bench and bar of New York. He has also received kudos for his illustrious service as president of the National College of Probate Judges and for his contributions as a faculty advisor to the National Judicial College.

Judge Brewster has been a long-standing supporter of Pace University and its Law School. He has been a frequent lecturer at many of the law school's continuing legal education programs and has been a steadfast VIP at most of our receptions for important dignitaries. Judge Brewster's excellence on the bench, coupled with his modesty and quiet strength, have earned him the deep respect and friendship of students, faculty, deans and alumni of Pace University.

Now that he has returned to private practice as counsel to a distinguished White Plains law firm, we wish him happiness and success. We will continue to rely on his indispensable advice and wise counsel. *Ad Multos Anos* Surrogate Brewster.

2.	<i>Parts II-D, and III</i> .....	358
3.	<i>Concurring Opinion of Justice White</i> .....	358
4.	<i>Concurring Opinion of Justice Brennan</i> .....	359
5.	<i>Concurring Opinion of Justice Stevens</i> .....	360
6.	<i>Effect of Burnham's Constitutional Consideration in New York</i> .....	360
B.	<i>Bases or Exercise of Jurisdiction</i> .....	361
1.	<i>CPLR 301: General Jurisdiction</i> .....	361
2.	<i>Long Arm Jurisdiction</i> .....	364
a.	<i>CPLR 302(a)(1)</i> .....	364
b.	<i>CPLR 302(a)(3)</i> .....	366
C.	<i>Forum Non Conveniens</i> .....	367
1.	<i>CPLR 327(a)</i> .....	367
2.	<i>Forum Non Conveniens In Federal Court</i> .....	368
3.	<i>Choice of Forum</i> .....	369
D.	<i>Statutory Requirements For Service Of Summons</i> ..	370
1.	<i>Strict Compliance</i> .....	371
2.	<i>Non-Resident Witness At Traverse Subject To Jurisdiction</i> .....	375
3.	<i>Substituted Service On Alleged Criminal Contemnor Does Not Violate Due Process Clause</i> .....	376
V.	<i>STATUTE OF LIMITATIONS</i> .....	378
A.	<i>Foreign Object Exception</i> .....	379
B.	<i>CPLR 214-a: The Continuous Treatment Doctrine</i> .....	381
C.	<i>CPLR 203(b)(5)</i> .....	382
D.	<i>CPLR 214-a: Definition Of The Term "Medical Malpractice"</i> .....	383
E.	<i>CPLR 202: The Borrowing Statute</i> .....	384
F.	<i>Uniform Federal Statute of Limitations for Some Private Securities Actions</i> .....	384
VI.	<i>RES JUDICATA</i> .....	385
A.	<i>Background</i> .....	387
B.	<i>D'Arata, Zuk, and Sullivan</i> .....	389
VII.	<i>SANCTION CASES, MANDATORY CONTINUING LEGAL EDUCATION, AND COMPULSORY PRO BONO</i> .....	393
A.	<i>Sanction Decisions</i> .....	393
B.	<i>Mandatory Continuing Legal Education</i> .....	398
C.	<i>Compulsory Pro Bono</i> .....	399

1991]	Civil Practice	345
VIII.	DISCLOSURE .....	400
IX.	PLEADINGS AND MOTIONS, VENUE AND APPEALS ....	403
	<i>A. Pleadings and Motions</i> .....	403
	<i>B. Venue and Appeals</i> .....	404
X.	MISCELLANEOUS .....	405
	<i>A. Opting Out of Class Actions</i> .....	405
	<i>B. Law School Dismissals</i> .....	406
	<i>C. Arbitration Clauses</i> .....	406
	<i>D. Legal Malpractice Claims</i> .....	406
	<i>E. Emotional Distress: First Appellate Ruling On</i> <i>Injury</i> .....	407
	<i>F. Contingency Fees</i> .....	407
	<i>G. Claims by Terminated Law Firm Partners</i> .....	407
	<i>H. Law School Enrollments and Bar Examinations</i> ...	407
	<i>I. Small Claims Court Not Bound By Formal</i> <i>Procedure</i> .....	408
	<i>J. Special Masters</i> .....	408
XI.	CONCLUSION .....	408

## I. INTRODUCTION

During the *Survey* year, the New York Court of Appeals issued important opinions with respect to strict compliance for service of process,<sup>1</sup> the foreign object exception under CPLR 214-a,<sup>2</sup> and disclosure against corporate employees.<sup>3</sup> The Court also imposed sanctions for the first time under Part 130 of the Uniform Rules,<sup>4</sup> and ruled that issue preclusion could be given to a criminal conviction to preclude subsequent civil litigation.<sup>5</sup> In addition the Court recognized that substituted service could be used against a criminal contemnor.<sup>6</sup> New York appellate courts issued instructive decisions regarding long-arm jurisdiction,<sup>7</sup> *forum non conveniens*,<sup>8</sup> and discovery of surveillance

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1. *See infra* notes 237-248 and accompanying text.

2. *See infra* notes 301-317 and accompanying text.

3. *See infra* notes 489-498 and accompanying text.

4. *See infra* notes 419-431 and accompanying text.

5. *See infra* notes 383-401 and accompanying text.

6. *See infra* notes 275-294 and accompanying text.

7. *See infra* notes 172-173 and accompanying text. *See also infra* notes 184-187 and accompanying text.

8. *See infra* notes 197-211 and accompanying text.

videos.<sup>9</sup> The Legislature also enacted amendments that affect General Municipal Law 205(e),<sup>10</sup> preferences,<sup>11</sup> Article 78,<sup>12</sup> traverse hearings,<sup>13</sup> court-annexed arbitration,<sup>14</sup> defaults,<sup>15</sup> health care proxies,<sup>16</sup> and forfeiture.<sup>17</sup> The Governor also signed legislation affecting notices of claim and statutes of limitation in wrongful death actions against a variety of public authorities.<sup>18</sup>

There were also several important federal decisions and federal legislation of which the New York bench and bar should be aware. The United States Supreme Court issued opinions pertaining to personal<sup>19</sup> and subject matter jurisdiction.<sup>20</sup> The Court also made important rulings with respect to venue,<sup>21</sup> res judicata,<sup>22</sup> discovery,<sup>23</sup> and Rule 11 sanctions.<sup>24</sup> The Court of Appeals for the Second Circuit adopted a uniform federal statute of limitations for private securities claims<sup>25</sup> and clarified use of the sixty day service toll in federal courts.<sup>26</sup> The court also analyzed what constitutes "doing business"

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9. See *infra* notes 499-501 and accompanying text.

10. See *infra* notes 34-39 and accompanying text.

11. See N.Y. CIV. PRAC. L. & R. 3403(a)(6) (McKinney Supp. 1991) [hereinafter N.Y. CPLR] (gives trial preference to plaintiff who is terminally ill when the illness arises out of the wrong for which the action is commenced).

12. See N.Y. CPLR 7804(g) (McKinney Supp. 1991) (Article 78 proceedings that relate to the substantial evidence question must be transferred to the appellate division; the 1990 amendment explicitly directs the supreme court to dispose of only those objections that could terminate the proceeding).

13. See UNIFORM RULES OF THE COURT 208.29 (McKinney 1990) (requiring any process server testifying at a traverse hearing to bring all records pertaining to service to the courthouse with his license if the server is licensed).

14. See N.Y. CPLR 3405 (McKinney Supp. 1990) (permitting the rules on court-annexed arbitration to raise the ceiling from \$6,000 to \$10,000 in the New York City Civil Court).

15. See *infra* note 47 and accompanying text.

16. See Act of July 22, 1990, ch. 725, 1990 MCKINNEY'S SESS. LAWS OF N.Y. 1539 (codified at N.Y. PUB. HEALTH LAW art. 29-c (McKinney Supp. 1991)). The Act will be effective on January 18, 1991 and relates to designation of agents to make health care decisions for individuals who are incapable of making those decisions.

17. See *infra* notes 52-54 and accompanying text.

18. See *infra* notes 40-41 and accompanying text.

19. See *infra* notes 90-142 and accompanying text.

20. See *infra* notes 68-88 and accompanying text.

21. See *infra* notes 63-65, 524-528 and accompanying text.

22. See *infra* notes 364-369 and accompanying text.

23. See *infra* notes 486-488 and accompanying text.

24. See *infra* notes 432-438 and accompanying text.

25. See *infra* notes 346-355 and accompanying text.

26. See *infra* notes 328-333 and accompanying text.

under CPLR 301.<sup>27</sup> Finally, on December 1, 1990, President Bush signed into law the Judicial Improvements Act of 1990.<sup>28</sup> The Act implements recommendations of the Federal Courts Study Committee and changes practice in federal court in a number of important areas.<sup>29</sup>

There were also important developments regarding mandatory continuing legal education<sup>30</sup> and mandatory pro bono.<sup>31</sup>

## II. NEW LEGISLATION

Space limitations prevent inclusion of an appendix summarizing all CPLR legislation enacted during the *Survey* year. The practitioner should review the table of contents for the various CPLR publications.<sup>32</sup> The most important statutory development is the Federal Judicial Improvements Act of 1990.<sup>33</sup> Prior to discussing the Act, the bench and bar should be alerted to several changes in various New York State statutes.

### A. *New York General Municipal Law*

Last year's *Survey* commented on Chapter 346 of the Laws of 1989 which gave a special cause of action in favor of police officers injured in the line of duty.<sup>34</sup> We stated that the new provision should be applied retroactively. The law became effective on July 12, 1989, and courts immediately began to differ as to whether it was retroactive. At least three lower courts held the statute to be remedial and thus retroactive.<sup>35</sup> On the other hand, the Appellate Divisions for the

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27. See *infra* notes 152-159 and accompanying text.

28. See *infra* notes 58-67 and accompanying text.

29. See *id.*

30. See *infra* notes 461-470 and accompanying text.

31. See *infra* notes 471-478 and accompanying text.

32. The complete text should be available for review in the 1990 CPLR publications by Matthew Bender, Gould Publications or West's McKinney Commentaries. Copies of the entire legislative texts may be obtained by contacting the Department of Governmental Relations. The practitioner should also consider subscribing to the Annual Legislative Bulletin of the Association of the Bar of the City of New York. The Bulletin analyzes the merits of the proposed bills and discusses their impact on current laws. It is an excellent research tool and will keep the practitioner abreast of developments in Albany well in advance of the *Survey's* publication.

33. See Pub. L. No. 101-650, 104 Stat. 5089, effective December 1, 1990.

34. See Carlisle, *Civil Practice, 1989 Survey of N.Y. Law*, 41 SYRACUSE L. REV. 63, 66-67 (1990) [hereinafter *Civil Practice, 1989 Survey*].

35. See *Brez v. McMellon*, N.Y.L.J., Feb. 6, 1990, at 27, col. 4; *Starkey v. Tran-*

First and Fourth Departments held the statute was not retroactive.<sup>36</sup> Both appellate divisions seemed to concede that the statute was remedial but stated there was no clear legislative intent to warrant retroactive application.<sup>37</sup> On July 26, 1990, Governor Cuomo signed new legislation<sup>38</sup> which clarifies the ambiguity in the previous amendment and creates a window of opportunity to sue until June 30, 1991 for those actions which were dismissed on or after January 1, 1987 because the section was not effective. The "window" also applies to claims that would have been actionable subsequent to January 1, 1987 had the section been effective. A state court of claims has held that the new reversal law may be unconstitutional.<sup>39</sup>

### B. *Wrongful Death Actions*

Chapter 804 of the Laws of 1990,<sup>40</sup> effective August 25, 1990, provides for a uniform two year statute of limitations for wrongful death actions against all authorities. The new legislation also provides for a uniform one year plus 90 day limitation for those public authorities which have no existing statute of limitations pertaining to causes of actions for personal injury. The law also incorporates the time limits of section 50-e of the General Municipal Law for service of notices of claim against public authorities.<sup>41</sup>

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camp Contracting Corp., 152 A.D.2d 358, 548 N.Y.S.2d 722 (2d Dep't 1989). See also Carlucci, *The Firemen's Rule and its Application to Police Officers*, 17 WESTCHESTER B. J. 33 (Winter 1990).

36. See *Ruotolo v. State*, 157 A.D.2d 452, 549 N.Y.S.2d 22 (1st Dep't 1990); *Guadagno v. B. & O. R. R. Co.*, 155 A.D.2d 981, 548 N.Y.S.2d 966 (4th Dep't 1989).

37. See *Ruotolo*, 157 A.D.2d at 453, 549 N.Y.S.2d at 23; *Guadagno*, 155 A.D.2d at 981, 548 N.Y.S.2d at 967.

38. See N.Y. GEN. MUN. LAW § 205-e (McKinney Supp. 1991).

39. See Spencer, *Officers Again Fail to Win in State Claim*, N.Y.L.J., Nov. 26, 1990, at 1, col. 6 (discussing decision by Court of Claims Judge Benza in *Santangelo v. New York*, Claim No. 81400 and *Kirschenheiter v. New York*, Claim No. 81401 to not apply the revival statute to their claims because a final judgment dismissing them had previously been entered).

40. See Act of July 25, 1990, ch. 804, 1990 MCKINNEY'S SESS. LAWS OF N.Y. 1607 (codified at N.Y. PUB. AUTH. LAW § 2981 (McKinney Supp. 1991)). This bill is a significant step toward bringing a degree of uniformity to the numerous and unpredictable short statutes of limitations against public authorities and corporations.

41. See Bauman, *New Bill Affects Wrongful Death Actions*, N.Y.L.J., Aug. 23, 1990, at 2, col. 6 ("The bill does not go so far towards uniformity as to change all existing statutes of limitations for commencement of suit in actions for personal injuries to a uniform one year plus 90 days now contained in General Municipal Law § 50-i, and Public Authorities Law § 1212 (2)(4).").

### C. Court of Claims Procedure

Section 11 of the Court of Claims Act relates to filing, service and contents of claim, and notice of intention, and sets out the manner of service of a claim or notice of intention, to file a claim.<sup>42</sup> Section 10 sets forth the time requirements.<sup>43</sup> Chapter 625 of the Laws of 1990<sup>44</sup> amends section 11 so that objections to noncompliance with requirements for time or manner of service are waived unless raised with particularity, either by a motion to dismiss made before service of the responsive pleading is required, or in the responsive pleading.<sup>45</sup> The amendment should diminish prior uncertainty and eliminate the possibility of unfair surprise.<sup>46</sup>

### D. Default Judgment

Chapter 419 of the Laws of 1990 amends CPLR 3215 by adding a new paragraph 4 to subdivision (f).<sup>47</sup> This addition provides that when a default judgment is sought on the grounds of non-appearance against a domestic or authorized foreign corporation, an affidavit shall be submitted that an additional service of summons by first class mail has been made upon the defendant corporation at its last known address at least twenty days before the entry of judgment.<sup>48</sup> The requirement is not applicable to cases in the small claims part or commercial claims part of any court, or to any summary proceedings to recover possession of real property, or to actions affecting title to real property.<sup>49</sup>

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42. See N.Y. CT. CL. ACT § 11 (McKinney 1989).

43. See *id.* § 10.

44. See Act of July 18, 1990, ch. 625, 1990 MCKINNEY'S SESS. LAWS OF N.Y. 1322 (codified at N.Y. CT. CL. ACT § 11 (McKinney Supp. 1991)).

45. See *id.* The new bill regularizes and clarifies the time constraints of Section 10 and the personal and certified mail service requirements of Section 11.

46. Prior to the enactment of the bill there was some confusion as to whether the service requirements of Section 11 related to subject matter or personal jurisdiction. Some judges had held that Section 11 requirements related to personal jurisdiction, which meant they were waivable, while other judges applied the Court of Appeals decision in *Finnerty v. New York State Thruway Auth.*, 75 N.Y.2d 721, 550 N.E.2d 441, 551 N.Y.S.2d 188 (1989), to require that they be viewed as issues of subject matter jurisdiction and not waivable.

47. See Act of July 10, 1990, ch. 419, 1990 MCKINNEY'S SESS. LAWS OF N.Y. 995 (codified at N.Y. CPLR 3215(f)(1) (McKinney Supp. 1991)).

48. See *id.*

49. See *id.*



*E. CPLR 217*

Chapter 457 of the Laws of 1990<sup>50</sup> extends the four month statute of limitations to actions complaining about conduct that would constitute a union's breach of its duty of fair representation. It is applicable to any action or proceeding against an employee organization subject to article fourteen of the civil service law or article twenty of the labor law, which complains that the employee organization has breached its duty of fair representation to someone to whom the organization has a duty. The statute requires that these actions shall be commenced within four months of the date the employee or former employee knew or should have known of the breach.<sup>51</sup>

*F. Forfeiture Laws*

Chapter 655 of the Laws of 1990,<sup>52</sup> effective November 1, 1990, enacts a sweeping revision of the state's forfeiture laws. The law incorporates the provisional remedies of CPLR 13-A, which permit prejudgment seizure of a defendant's assets without the explicit requirement of a due process probable cause hearing.<sup>53</sup> Nonetheless, a due process hearing may be required, at least prior to the seizure of real property.<sup>54</sup>

*G. Additional Items*

The practitioner may also wish to become familiar with new amendments relating to jury trial,<sup>55</sup> small claims court actions<sup>56</sup> and

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50. See Act of July 10, 1990, ch. 467, 1990 MCKINNEY'S SESS. LAWS OF N.Y. 1087 (codified at N.Y. CPLR 217 (McKinney Supp. 1991)).

51. See *id.*

52. See Act of July 18, 1990, ch. 655, 1990 MCKINNEY'S SESS. LAWS OF N.Y. 1358 (codified at N.Y. CPLR 1311 (McKinney Supp. 1991)).

53. See *id.*

54. See *United States v. Premises and Real Property* at 4492 S. Livonia Rd., Livonia, N.Y., 889 F.2d 1258 (2d Cir. 1989), in which the Court of Appeals for the Second Circuit held that a due process hearing was necessary prior to the seizure of real property.

55. See N.Y. CPLR 4102 (McKinney Supp. 1990). Subsection (a) of CPLR 4102 had been construed by the courts to hold that a party who filed a note of issue without a jury demand was unable to object when another party filed a jury demand but later determined to withdraw it. The new amendment to subsection (a) requires the other party to obtain consent of the filer of the note of issue prior to withdrawing the demand. Thus, the amendment overrules prior contrary case law. *Id.*

56. See N.Y. CITY CIV. CT. ACT § 1801-A (McKinney Supp. 1991) (raises the monetary jurisdiction of commercial small claims parts in the civil, district and city courts from \$1,500 to the maximum amount permitted in small claims court, currently \$2,000).

income execution.<sup>57</sup>

### *H. Judicial Improvements Act of 1990*

This Act was passed by Congress in the midst of its final late night budget reconciliation session of October 27-28, 1990.<sup>58</sup> The Act is an omnibus statute which consists of eight separate titles. Each title is referred to by name as a separate "Act."

Title I is the Civil Justice Reform Act of 1990. It provides for an expanded process to reduce delay in civil litigation in the federal courts. Title II is the Federal Judgeship Act of 1990. It authorizes 11 new circuit judgeships and 74 new district judgeships, and gives permanent status to some existing judgeships that were previously only temporary. Title III is the Federal Courts Study Committee Implementation Act of 1990. It includes important changes to the law of supplemental jurisdiction, removal, venue and appellate jurisdiction. It also introduces changes to the limitations period applicable to claims and actions when supplemental jurisdiction has been invoked and to the limitations period for civil actions arising under newly enacted federal statutes. Title IV is the Judicial Discipline and Removal Reform Act of 1990. It makes changes in the procedure for the investigation of complaints of judicial misconduct. Title IV also creates a national commission to review issues involving the tenure of Article III federal judges, including discipline and removal. The remaining four titles do not relate to the operation of federal courts. They are: Title V (Television Program Improvement Act of 1990); Title VI (The Visual Artist Rights Act of 1990); Title VII (Architectural Works Copyright Protection Act); and Title VIII (Computer Software Rental Amendments Act of 1990).

Title III of the Act is particularly important to the New York practitioner. Section 310 adds new section 1367 to Title 28 of the United States Code.<sup>59</sup> Section 1367, effective only as to civil actions which are commenced on or after December 1, 1990, creates supplemental jurisdiction. This jurisdiction includes pendent claim and ancillary jurisdiction and specifically repudiates *Finley v. United States*<sup>60</sup>

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57. See N.Y. CPLR 5231 (McKinney Supp. 1991) (income from all sources, and not just earnings, is subject to the ten percent income levy).

58. See Pub. L. 101-650, 104 Stat. 5089 (1990). See also Giuffra, *The Judicial Improvements Act of 1990*, 204 N.Y.L.J. 122, Dec. 26, 1990, at 1, col 1.

59. See Pub. L. 101-650, § 310, 104 Stat. 5089, 5113-14 (1990).

60. 490 U.S. 545 (1989) (on an issue of subject matter jurisdiction, the United States

by authorizing pendent party jurisdiction. Supplemental jurisdiction is prohibited over persons made parties or seeking to become parties under Civil Rules 14, 19, 20, or 24 when exercising jurisdiction over such claims would be inconsistent with the jurisdictional requirements of complete diversity under 28 U.S.C. section 1332.<sup>61</sup> Section 311<sup>62</sup> amends 28 U.S.C. section 1391 relating to venue in federal civil actions. The provision for venue based on the residence of the plaintiff is repealed. Under the former rule, venue was established in a judicial district in which the defendant or all defendants reside and in a district in which a substantial part of the claim arose. As a result of the amendment, venue in federal question actions is broadened beyond the defendant's residence and the place where a substantial part of the claim arose to include a new provision pertaining to "venue by necessity." This permits venue in a judicial district where any defendant may be found, if there is no district in which the action may otherwise be brought.<sup>63</sup>

Title III also affects removal jurisdiction. Section 312 amends 28 U.S.C. 1441(c) to limit the predicate separate and independent claim to one that is within the federal question jurisdiction of 28 U.S.C. section 1331.<sup>64</sup> Thus if removal is effected under newly amended section 1441(c), the district court has discretion to remand only matters in which state law predominates.<sup>65</sup> Title III also affects statute of limitations. Section 313 enacts a general four year statute of limitations respecting civil actions arising under Acts of Congress that do not specifically set forth a period of limitations.<sup>66</sup> This provision applies only to causes of action arising under legislation which Congress enacts after December 1, 1990. Title III also relates to rules governing finality under 28 U.S.C. section 1291. Congress currently authorizes appeal as of right from all final decisions of the district courts under 28 U.S.C. section 1291. Section 315 amends the Rules Enabling Act

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Supreme Court, in a 5-4 decision, refused to allow a San Diego woman whose family died in a 1983 airplane crash to sue the federal government, San Diego, and a utility company in one federal lawsuit).

61. See 28 U.S.C. § 1332 (Supp. 1990) (providing for diversity subject matter jurisdiction between citizens of different states if the amount in controversy is at least \$50,000).

62. See 28 U.S.C. § 1391 (Supp. 1990).

63. See Pub. L. 101-650, § 311, 104 Stat. 5089, 5114 (1990).

64. See *id.* § 312, 104 Stat. 5089, 5114 (1990).

65. See *id.*

66. See *id.* § 313, 104 Stat. 5089, 5114-15 (1990). The federal law does not incorporate applicable state tolls and extensions.

to permit the Supreme Court to determine by rule instead of case law the terms and conditions under which district court decisions will be considered final and appealable under section 1291.<sup>67</sup>

### III. SUBJECT MATTER JURISDICTION

There are three important opinions by the U.S. Supreme Court that affect subject matter jurisdiction.<sup>68</sup> In addition, the newly enacted Judicial Improvements Act of 1990<sup>69</sup> repudiates the Supreme Court's recent holding in *Finley*.<sup>70</sup>

In *Carden v. Arkoma Associates*,<sup>71</sup> the Supreme Court held that the citizenship of all partners in a limited partnership, rather than citizenship of general partners alone or the state where the partnership is created, governs determinations of whether diversity of citizenship exists for federal jurisdictional purposes.<sup>72</sup> The *Carden* decision was recognized by the Court of Appeals for the Second Circuit in *Curley v. Brignoli*.<sup>73</sup>

In *Port Authority v. Feeney*,<sup>74</sup> the Supreme Court resolved a conflict between the Second and Third Circuits by ruling that the Port Authority of New York and New Jersey was not immune, as a state agency under the eleventh amendment, from suits in federal court.<sup>75</sup> In a unanimous opinion, the Court affirmed a decision by the Court of Appeals for the Second Circuit which permitted two personal injury suits by Port Authority employees to be filed in Manhattan federal court.<sup>76</sup>

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67. See *id.* § 315, 104 Stat. 5089, 5115 (1990).

68. See *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990); *Taffin v. Levitt*, 493 U.S. 455 (1990); *Port Authority v. Feeney*, 110 S. Ct. 1868 (1990).

69. See *supra* notes 58-61 and accompanying text.

70. 490 U.S. 545 (1989). See Pub. L. 101-650, § 310, 104 Stat. 5089, 5113-14 (1990).

71. 110 S. Ct. 1015 (1990).

72. *Carden*, 110 S. Ct. at 1021.

73. 915 F.2d 81 (2d Cir. 1990) (Second Circuit noted that *Carden* answered in the affirmative the question whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties).

74. 110 S. Ct. 1868 (1990).

75. *Id.* at 1873-74.

76. Justice O'Connor, writing for a majority of five, stated that the New York and New Jersey Legislatures had agreed, when they created the bi-state agency in 1921, to waive any immunity to federal lawsuits that the states may enjoy. Thus, she held that the eleventh amendment to the U.S. Constitution, which protects states from federal lawsuits, was not applicable to the Port Authority. Four justices stated that they would go

Last year's *Survey*<sup>77</sup> promised to track *Tafflin v. Levitt*.<sup>78</sup> The U.S. Supreme Court unanimously held that state courts have jurisdiction to hear civil lawsuits brought under the Federal Racketeer Influenced and Corrupt Organizations Act.<sup>79</sup> We also analyzed *Finley*,<sup>80</sup> where the Supreme Court purported to bury pendent party jurisdiction.<sup>81</sup> During the *Survey* year, New York federal judges applied *Finley* differently.<sup>82</sup> In *Aetna Casualty & Surety v. Spartan Mechanical*,<sup>83</sup> Judge Bartels concluded that, in light of the *Finley* decision, the district court did not have subject matter jurisdiction over the third party claims for contribution or indemnification, since they lacked an independent jurisdictional basis and were not within ancillary jurisdiction of the court.<sup>84</sup> In *Huberman v. Duane Fellows*,<sup>85</sup> Judge Leisure held that the *Finley* doctrine was not applicable to a third party defendant.<sup>86</sup> On December 1, 1990 President Bush signed into law the Judicial Improvements Act of 1990.<sup>87</sup> Section 310 of Title III of the Act adds a new section 1367 to Title 28 of the U.S. Code. This section applies only to actions commenced after December 1, 1990 and specifically authorizes pendent party jurisdiction. It impliedly repudiates *Finley*.<sup>88</sup>

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further and permit the Port Authority to be sued in federal court even if the states had not consented.

77. See Carlisle, *Civil Practice, 1989 Survey*, *supra* note 34, at 85.

78. 110 S. Ct. 792 (1990).

79. In 1988 the New York Court of Appeals held in *Simpson Elec. Corp. v. Leucadia, Inc.*, 72 N.Y.2d 450, 530 N.E.2d 860, 534 N.Y.S.2d 152 (1988), that New York State courts shared subject matter jurisdiction with the federal courts over civil claims brought under RICO. See Carlisle, *N.Y. Civil Practice, 1988 Survey of N.Y. Law*, 40 SYRACUSE L. REV. 77, 95 (1989) [hereinafter *Civil Practice, 1988 Survey*].

80. 109 S. Ct. 2003. See Carlisle, *Civil Practice, 1989 Survey*, *supra* note 34, at 85.

81. *Finley* involved an action under the Federal Tort Claims Act. Pendent jurisdiction was sought against the municipal and utility defendants on state claims. The United States Supreme Court had previously rejected pendent jurisdiction in *Aldinger v. Howard*, 427 U.S. 1 (1976) but left open the issue of whether pendent party jurisdiction could exist if a federal claim was within the exclusive jurisdiction of a federal court. In *Finley*, the Court held that absent an independent base for subject matter jurisdiction against one of several defendants, dual litigation will be required.

82. See *Aetna Casualty & Sur. Co. v. Spartan Mechanical Corp.*, 738 F. Supp. 664 (E.D.N.Y. 1990); *Huberman v. Duane Fellows Inc.*, 725 F. Supp. 204 (S.D.N.Y. 1989).

83. 738 F. Supp. 664 (E.D.N.Y. 1990).

84. *Aetna*, 738 F. Supp. at 664.

85. 725 F. Supp. 204 (S.D.N.Y. 1989).

86. *Huberman*, 725 F. Supp. at 204.

87. See *supra* notes 58-59 and accompanying text.

88. See 28 U.S.C. § 1367 (1991).

## IV. PERSONAL JURISDICTION

A. *Constitutional Limitations on In Personam Jurisdiction*

Prior *Surveys* have discussed some of the relevant constitutional considerations necessary for the assertion of jurisdiction in New York.<sup>89</sup> During the *Survey* year, the United States Supreme Court analyzed these considerations in *Burnham v. Superior Court of California*.<sup>90</sup> *Burnham* merits discussion because of its approach to the doctrine of minimum contacts.<sup>91</sup> It also serves as another example of how a defendant personally served or tagged in New York is subject to the *in personam* jurisdiction of our courts.<sup>92</sup>

The *Burnham* facts are simple. Dennis Burnham married Francie Burnham in 1976. In 1977 they moved to New Jersey where two children were born. In July of 1987 the Burnhams separated. Mrs. Burnham moved to California with custody of the two children. The Burnhams agreed that she would file for divorce on grounds of irreconcilable differences. Nonetheless, in October of 1987, Dennis filed for divorce in New Jersey on the grounds of desertion but failed to make service of process upon Francie. In January of 1988, Francie filed for divorce in California but did not make service on Dennis. Thereafter, Dennis traveled to California on business and visited his children in the San Francisco area where Francie resided. Dennis took one child away for a weekend trip and upon return to Francie's home, was served with a summons and copy of the divorce action. Dennis returned to New Jersey and later in the year made a special appearance in the California superior court to challenge the court's *in personam* jurisdiction.<sup>93</sup>

The California courts found that Dennis was subject to jurisdiction.<sup>94</sup> The U.S. Supreme Court accepted certiorari<sup>95</sup> and found that

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89. See Carlisle, *N.Y. Civil Practice, 1987 Survey of N.Y. Law*, 39 SYRACUSE L. REV. 75, 88-98 (1988) [hereinafter *Civil Practice, 1987 Survey*] (analyzing the United States Supreme Court decision in *Asahi v. Superior Court of California*, 480 U.S. 102 (1987)). See also Carlisle, *N.Y. Civil Practice, 1986 Survey of N.Y. Law*, 38 SYRACUSE L. REV. 67, 85-88 (1987) [hereinafter *Civil Practice, 1986 Survey*] (analyzing the United States Supreme Court decision in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985)).

90. 110 S. Ct. 2105 (1990).

91. See *infra* notes 84-134 and accompanying text.

92. See J. WEINSTEIN, H. KORN & A. MILLER, *NEW YORK CIVIL PRACTICE* § 301.10 [hereinafter WEINSTEIN, KORN & MILLER].

93. *Burnham*, 110 S. Ct. at 2109 (1990).

94. *Id.*

95. *Burnham*, 110 S. Ct. 47 (1989).

jurisdiction existed; however the Court adopted different views of when presence constitutes a jurisdictional predicate.<sup>96</sup> First, the plurality focused on an historical evidence and consensus or common law historical pedigree approach. Justices Scalia, Kennedy, and Chief Justice Rehnquist explained in Parts I, II-A, B, C, D<sup>97</sup> and III that transient presence alone was sufficient for a jurisdictional base. Second, Justice White, who joined the plurality in all respects except for Parts II-D and III of the opinion, concurred in the judgment. He explained that in limited circumstances the Court could find that presence alone was not sufficient for jurisdictional purposes.<sup>98</sup> Third, Justices Brennan, Marshall, Blackmun and O'Connor concurred in the judgment but found that presence alone was not enough for an assertion of *in personam* jurisdiction.<sup>99</sup> They concluded that it was necessary to conduct an independent due process inquiry.<sup>100</sup> Fourth, Justice Stevens concurred in the judgment and explained that he could join neither Justice Scalia's nor Justice Brennan's opinion in the case.<sup>101</sup> Justice Stevens stated that the historical evidence and consensus identified by Justice Scalia, the considerations of fairness identified by Justice Brennan, and the common sense displayed by Justice White, all combined to demonstrate that the case was an easy one.<sup>102</sup> Justice Stevens also observed that "[p]erhaps the adage about hard cases making bad law should be revised to cover easy cases."<sup>103</sup>

### 1. *Parts II-A, II-B, and II-C*

Justice Scalia, joined by Chief Justice Rehnquist and Justices White and Kennedy, concluded that the Due Process Clause of the fourteenth amendment does not deny a state court's jurisdiction over a nonresident who was personally served with process while temporarily in that state when the suit is unrelated to his activities in the state.<sup>104</sup>

(a) The plurality explained that in determining whether the assertion of personal jurisdiction is consistent with due process, the

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96. *Id.* at 2116-17, 2119-20, 2126.

97. *Id.* at 2109-19.

98. *Id.* at 2119-20.

99. *Id.* at 2120 (Brennan, J., concurring).

100. *Burnham*, 110 S. Ct. at 2120-21.

101. *Id.* at 2126 (Stevens, J., concurring).

102. *Id.*

103. *Id.*

104. *Burnham*, 110 S. Ct. at 2119 (plurality opinion).

Supreme Court has long relied on the principles traditionally followed by American courts in marking out the territorial limits of each state's authority. The plurality admitted that the classic expression of that criterion appeared in *International Shoe v. Washington*,<sup>105</sup> which held that a state court's assertion of personal jurisdiction must not violate "traditional notions of fair play and substantial justice."<sup>106</sup> Nonetheless, the plurality explained that the *International Shoe* holding was not intended to be applicable to cases where jurisdiction was based on presence.<sup>107</sup>

(b) In Part II-B, the plurality explained that a formidable body of precedent, beginning with common-law antecedents and extending through decisions at or near the time of the fourteenth amendment's adoption, reflected the almost unanimous view that service of process confers state-court jurisdiction over a nonresident who is physically present, regardless of whether he was only in the state on a transient basis or whether the cause of action is related to his activities there.<sup>108</sup>

(c) In Part II-C, the plurality rejected the petitioner's challenge to the old rule that presence alone is sufficient as a jurisdictional predicate.<sup>109</sup> In this respect, petitioner had argued that in *Shaffer v. Heitner*<sup>110</sup> the Court had adopted sweeping language which held that all assertions of jurisdiction must be pursuant to the minimum contacts standard of *International Shoe*.<sup>111</sup> The plurality explained that the *International Shoe* standard was developed by analogy to the traditional physical presence requirement. The new standard served as a means of evaluating novel state procedures for assertion of *in personam* jurisdiction over absent defendants.<sup>112</sup> The plurality noted that these novel procedures were developed primarily with respect to state long-arm statutes whereby a nonresident defendant could be subjected to judgment only as to matters that arise out of or relate to his contacts with the forum state.<sup>113</sup> The plurality held that nothing in the *International Shoe* case or its progeny supported the proposi-

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105. 326 U.S. 310 (1945).

106. *International Shoe*, 326 U.S. at 316.

107. *Burnham*, 110 S. Ct. at 2115.

108. *Id.* at 2110-13.

109. *Id.* at 2113.

110. 433 U.S. 186 (1977).

111. *Burnham*, 110 S. Ct. at 2113 (discussing *International Shoe v. Washington*, 326 U.S. 310 (1945)).

112. *Id.* at 2114-15.

113. *Id.*



tion that a defendant's presence in the forum state is itself not a sufficient jurisdictional predicate.<sup>114</sup>

## 2. *Parts II-D and III*

Justice Scalia, joined by Chief Justice Rehnquist and Justice Kennedy, concluded that *Shaffer*<sup>115</sup> must be strictly limited to its facts and that Justice Brennan's proposal to apply an independent due process inquiry constituted a break with the *International Shoe* standard.<sup>116</sup>

(a) Justice Scalia explained that when read in context, *Shaffer*'s statement that "all assertions of state-court jurisdiction must be evaluated according to the [*International Shoe*] standards,"<sup>117</sup> was intended only to apply to *quasi in rem* jurisdiction. Justice Scalia admitted that the *Shaffer* holding was applicable to other forms of *in personam* jurisdiction over nonresident defendants, but not to defendants who were present in the forum when served.<sup>118</sup>

(b) Justice Scalia argued that Justice Brennan's proposal for use of an independent due process inquiry for all state assertions of jurisdiction was nothing more than a totality of the circumstances test which would lead to uncertainty and to unnecessary litigation over the preliminary issue of the court's competence.<sup>119</sup> Justice Scalia explained that each justice would be required to exercise his or her subjective discretion as to what is fair and just. This would lead to a misuse of judicial resources and result in inconsistent decisions.<sup>120</sup>

## 3. *Concurring Opinion of Justice White*

Justice White joined Part I and Parts II-A, II-B and II-C of the plurality's opinion. He explained that the rule permitting an assertion of *in personam* jurisdiction on the grounds of presence alone is so widely accepted that he could not possibly strike it down, either on its face or as applied to the *Burnham* facts, on the ground that it denied due process of law. Justice White went on to note that the Court does have power under the fourteenth amendment to examine even tradi-

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114. *Id.* at 2115.

115. 433 U.S. 186 (1977).

116. *Burnham*, 110 S. Ct. at 2117.

117. *Id.* at 2116.

118. *Id.*

119. *Id.* at 2119.

120. *Id.* at 2117.

tionally accepted procedures and declare them invalid.<sup>121</sup> He recognized the sweeping language of *Shaffer*<sup>122</sup> but argued that it would be applicable only if a forum's jurisdictional rule was so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case.<sup>123</sup> Justice White noted that until such a showing is made, claims that the rule would operate unfairly as applied to a certain nonresident need not be heard.<sup>124</sup> If the defendant's presence in the forum is intentional, that is enough for Justice White. His common sense approach was based on a desire to avoid endless, fact-specific litigation in the trial and appellate courts.<sup>125</sup>

#### 4. *Concurring Opinion of Justice Brennan*

Justices Brennan, Marshall, Blackmun and O'Connor concurred in the judgment but argued that presence alone does not automatically comport with due process simply by virtue of its pedigree. Justice Brennan agreed that history is an important factor in establishing whether a jurisdictional rule satisfies due process requirements, but posited that an independent inquiry into the fairness of the prevailing in-state service rule must be undertaken.<sup>126</sup>

Justice Brennan noted that the transient jurisdiction rule will generally satisfy due process requirements because the rule is consistent with reasonable expectations and is entitled to a strong presumption that it comports with the fourteenth amendment.<sup>127</sup> Since Dennis Burnham availed himself of significant benefits provided by the forum state, it was foreseeable that he could expect to litigate there. Justice Brennan also pointed to a variety of procedural devices that could ameliorate any burdens that might arise.<sup>128</sup> Finally, Justice Brennan argued that the Scalia approach was foreclosed by the Court's holdings in *International Shoe* and *Shaffer*.<sup>129</sup>

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121. *Burnham*, 110 S. Ct. at 2119 (White, J., concurring).

122. 433 U.S. 186 (1977).

123. *Burnham*, 110 S. Ct. at 2119-20 (White, J., concurring).

124. *Id.* at 2120.

125. *See id.*

126. *See id.* (Brennan, J., concurring).

127. *See id.* at 2124.

128. *See Burnham*, 110 S. Ct. at 2125.

129. *See id.* at 2120.

### 5. *Concurring Opinion of Justice Stevens*

Justice Stevens explained that he did not join the Court's opinion in *Shaffer*<sup>130</sup> because he was concerned by its unnecessarily broad reach. He explained that the same concern prevented him from joining the Scalia or Brennan approach in *Burnham*. He criticized Justice Scalia's suggestion that when and if a jurisdictional rule becomes substantively unfair or even unconscionable, the Court has no power to alter it.<sup>131</sup> Justice Stevens also questioned Justice Scalia's reliance on individual states to limit or abandon bases of jurisdiction that have become obsolete.<sup>132</sup> Justice Stevens explained that states have little incentive to limit rules such as transient jurisdiction.<sup>133</sup> Finally, Justice Stevens noted that the reasoning of Justice Scalia's opinion was strikingly oblivious to the *raison d'être* of various constitutional doctrines designed to protect out-of-staters, such as the Art. IV Privileges and Immunities Clause and the Commerce Clause.<sup>134</sup>

### 6. *Effect of Burnham's Constitutional Consideration in New York*

It has been long recognized in New York that any person served with a summons while physically present in the state is subject to suit in New York on any claim.<sup>135</sup> Although this aging doctrine has been questioned by some courts,<sup>136</sup> there is no New York decision which has held to the contrary. If a nonresident defendant is tagged with process, even if the action is unrelated to his temporary presence in New York, our courts will have *in personam* jurisdiction.<sup>137</sup> This rule has two exceptions. A person is not deemed present in the state for

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130. 433 U.S. 186 (1977).

131. *Burnham*, 110 S. Ct. at 2126 (Stevens, J., concurring).

132. *Shaffer v. Heitner*, 433 U.S. 186, 218-19 (Stevens, J., concurring).

133. *See Shaffer*, 433 U.S. at 218-19.

134. *Id.* *See also* U.S. CONST. art. IV, § 2; U.S. CONST. art. I, § 8, cl. 2.

135. *See* WEINSTEIN, KORN & MILLER, *supra* note 92, at § 301.10.

136. Some courts have concluded that transient jurisdiction did not survive *Shaffer v. Heitner*. *See* *Nehemiah v. Athletics Congress of U.S.A.*, 765 F.2d 42, 46-47 (3d Cir. 1985); *Schreiber v. Allis-Chalmers Corp.*, 448 F. Supp. 1079, 1088-91 (D. Kan. 1978), *rev'd on other grounds*, 611 F.2d 790 (10th Cir. 1979); *Harold M. Pitman Co. v. Typecraft Software Ltd.*, 626 F. Supp. 305, 310-14 (N.D. Ill. 1986); *Bershaw v. Sarbacher*, 40 Wash. App. 653, 657, 700 P.2d 347, 349 (1985). *See also* Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 YALE L.J. 289, 293-303 (1965).

137. *See* *Aluminal Indus. v. Newtown Commercial Assoc.*, 89 F.R.D. 326 (S.D.N.Y. 1980); *Opert v. Schmidt*, 535 F. Supp. 591 (S.D.N.Y. 1982).

purposes of process service when he was induced to enter by fraud,<sup>138</sup> and he is immune from process when he is voluntarily in the state to attend a civil or criminal litigation whether as plaintiff, defendant or witness.<sup>139</sup> Also, the rule is subject to the discretionary power of the courts under CPLR 327<sup>140</sup> to decline jurisdiction.<sup>141</sup> It remains to be seen if New York courts will reject transient presence when the facts of a given case show unfairness, involuntariness, inconvenience or similar circumstances. It is highly likely that New York courts will apply the forum non conveniens doctrine to minimize unfairness. In this respect, New York courts are generally unwilling to dismiss cases under CPLR 327(a) when the plaintiff is a New York resident.<sup>142</sup>

### *B. Bases or Exercise of Jurisdiction*

#### *1. CPLR 301: General Jurisdiction*<sup>143</sup>

The traditional bases for the exercise of jurisdiction that developed prior to the adoption of the CPLR were incorporated into it by CPLR 301.<sup>144</sup> Thus, personal jurisdiction based on physical presence,<sup>145</sup> domicile,<sup>146</sup> consent,<sup>147</sup> or "doing business"<sup>148</sup> permits New York courts to assert jurisdiction over a defendant for any cause of action irrespective of whether it arises from the defendant's contacts

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138. See generally WEINSTEIN, KORN & MILLER, CPLR MANUAL § 304[a] (1986 ed.) [hereinafter CPLR MANUAL].

139. *Id.*

140. See N.Y. CPLR 327(a) (McKinney 1990).

141. Even if a New York court has subject matter and personal jurisdiction, CPLR 327(a) gives the court discretionary power to dismiss the case. Under CPLR 327(b), however, dismissal is highly unlikely if the action arises out of a contract agreement or undertaking to which section 5-1402 of the General Obligations Law applies if the parties have agreed that New York law will govern.

142. See *infra* notes 201-211 and accompanying text.

143. See N.Y. CPLR 301 (McKinney 1990).

144. See *id.*

145. Two exceptions should be noted: a person is not deemed present in New York for purposes of process service when he was induced to enter by fraud, and he has immunity from process when he appears voluntarily, as a plaintiff or defendant, to attend proceedings involving criminal or civil litigation. See *supra* notes 138-139 and accompanying text.

146. See N.Y. CPLR 313 (McKinney 1990) (New York domiciliary subject to in personam jurisdiction on any claim, wherever it arises, and regardless of where the defendant is located at the time the summons is served).

147. See N.Y. CPLR 301 (McKinney 1990).

148. See *Bryant v. Finnish Nat'l Airline*, 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965); *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259, 115 N.E. 915 (1917).

with New York.<sup>149</sup>

The "doing business" concept is frequently used to obtain jurisdiction over a foreign corporation.<sup>150</sup> Although the Court of Appeals has stated "[t]he test for doing business is and should be a simple pragmatic one . . . ,"<sup>151</sup> a review of the cases decided during the *Survey* year indicates that the test, while pragmatic, is far from simple. Three cases are worthy of comment.

Within a one week period, both the Court of Appeals for the Second Circuit and the New York Court of Appeals agreed that insurance underwriters at Lloyd's of London were not "doing business" in the state and could not be sued here, despite their substantial interest in a trust fund maintained in a New York bank for the purpose of paying American claims.<sup>152</sup> A decision to the contrary would have meant that any multinational company that had a banking relationship with New York could have been found to be doing business here. The circuit court listed the many contacts appellants had with New York<sup>153</sup> but noted that since the cause of action did not arise out of any of them, CPLR 301 was the only possible jurisdictional predicate.<sup>154</sup> The circuit court explained that in assessing general jurisdiction in New York, courts have generally focused on the existence of an office in New York; the solicitation of business in New York; the presence of bank accounts or other property in New York; and the presence of employees or agents in New York.<sup>155</sup> The circuit court noted that solicitation of business alone did not justify a finding of corporate presence in New York.<sup>156</sup> Appellants argued that under the solicitation-plus theory<sup>157</sup> there was general jurisdiction. They claimed that the defendants' employees' trips to the United States to service existing accounts and solicit new ones constituted substantial

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149. See *Laufer v. Ostrow*, 55 N.Y.2d 305, 310, 434 N.E.2d 692, 695, 449 N.Y.S.2d 456, 458 (1982).

150. See *Laufer* at 310, 434 N.E.2d at 695, 449 N.Y.S.2d at 458.

151. See *Bryant*, 15 N.Y.2d at 432, 208 N.E.2d at 441, 260 N.Y.S.2d at 628-29. Cf. cases collected and discussed in WEINSTEIN, KORN & MILLER, *supra* note 92, at § 301.16.

152. See *Landoil Resources Corp. v. Alexander; Alexander & Alexander Servs., Inc.*, 77 N.Y.2d 28, 565 N.E.2d 488, 563 N.Y.S.2d 739 (1990) and *Landoil Resources Corp. v. Alexander; Alexander & Alexander Servs., Inc.*, 918 F.2d 1039 (2d Cir. 1990).

153. *Landoil*, 918 F.2d at 1039.

154. *Id.*

155. *Id.*

156. *Id.*

157. *Landoil*, 918 F.2d at 1044.

solicitation and that the following factors met the "plus" portion of the test: the placement of New York insurance risks in London; the placement of foreign insurance risks in New York and the circumstance that some of the defendants received substantial revenue from their New York transactions.<sup>158</sup> The circuit court held that the solicitation-plus rule was not a talismanic test for jurisdiction, but instead was merely a means by which courts have attempted to resolve that issue.<sup>159</sup> The court concluded that the district court did not err in finding that the record did not establish by a preponderance of the evidence a sufficient predicate of jurisdiction under CPLR 301. The New York Court of Appeals reached a similar result in *Landoil Resources v. Alexander & Alexander*,<sup>160</sup> which came to the Court as a certified question from the U.S. Court of Appeals for the Second Circuit. Our highest state court unanimously ruled that the underwriter's indirect interest in the trust fund at Citibank was insufficient to confer jurisdiction under CPLR 301.<sup>161</sup> Both *Landoil* decisions demonstrate that New York State and Federal courts must analyze a defendant's connections to the forum state "not for the sake of contact-counting, but rather for whether such contacts show a continuous, permanent and substantial activity in New York."<sup>162</sup>

In *Chasser v. Achille Lauro Lines*,<sup>163</sup> one key issue before the district court was whether the P.L.O., which is not recognized as a state by the U.S. government, was "doing business in New York."<sup>164</sup> Judge Stanton noted that not only does the P.L.O. own a building in New York City in which its permanent representative and his family live, but there also were eight other employees residing in the building.<sup>165</sup> Judge Stanton also pointed out that the P.L.O. owned an automobile and maintained a bank account in New York and was listed in the telephone book.<sup>166</sup> Similarly, the judge observed that the P.L.O.'s permanent representative engaged the media to publicize P.L.O. policies and spoke wherever he could obtain an invitation.<sup>167</sup> Judge Stan-

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158. *Id.*

159. *Id.* at 1044.

160. *Landoil*, 77 N.Y.2d at 31, 565 N.E.2d at 489, 563 N.Y.S.2d at 740 (1990).

161. *Id.* at 35, 565 N.E.2d at 491, 563 N.Y.S.2d at 742.

162. See generally CPLR MANUAL, *supra* note 138, at § 304(d).

163. 739 F. Supp. 854 (S.D.N.Y. 1990).

164. *Chasser*, 739 F. Supp. at 863.

165. *Id.* at 857.

166. *Id.*

167. *Klinghoffer v. S.N.C. Achille Lauro*, 739 F. Supp. 854, 863 (S.D.N.Y. 1990).

ton held that the aggregate of these activities constituted doing business under CPLR 301.

## 2. *Long Arm Jurisdiction*

CPLR 302<sup>168</sup> permits New York courts to assert jurisdiction over nondomiciliary individuals and foreign corporations<sup>169</sup> that are not subject to CPLR 301, but instead have the state contacts listed in section 302.<sup>170</sup> This "long-arm" jurisdiction is limited by the terms of CPLR 302 and by federal and state constitutional considerations to claims that arise from the defendant's activity related to New York.<sup>171</sup>

A review of the personal jurisdiction cases decided during the *Survey* year<sup>172</sup> supports the observation that "long-arm inquiries can leave the realm of the merely monotonous and become intensely monotonous."<sup>173</sup> Of the many cases interpreting CPLR 302, the following are worthy of brief mention.

### a. *CPLR 302(a)(1)*

Subsection (a) of CPLR 302 specifically excludes from its reach the tort of defamation. That exclusion is contained in both CPLR 302(2) and (a)(3) covering torts committed both within and outside of New York. In *Vardinoyannis v. Encyclopedia Britannica*,<sup>174</sup> Judge Leval held that the plaintiffs failed to establish that the defendants transacted business in New York by mailing allegedly defamatory letters. Judge Leval pointed out that while the contacts were business-

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168. See N.Y. CPLR 302 (McKinney 1991).

169. See *Simonson v. Int'l Bank*, 14 N.Y.2d 281, 288, 200 N.E.2d 427, 431, 251 N.Y.S.2d 433, 438 (1964) ("[a]lthough the section does not in terms refer to corporations, its application to foreign corporations, as well as to nonresident individuals, seems clear.")

170. See N.Y. CPLR 302 (McKinney 1990).

171. See *Sharrock v. Dell Buick-Cadillac, Inc.*, 45 N.Y.2d 152, 379 N.E.2d 1169, 408 N.Y.S.2d 39 (1978) (standing for the proposition that the New York Constitution has a due process clause which the Court of Appeals has held may require more than its federal counterpart); see also *Svendsen v. Smith's Moving & Trucking Co.* 54 N.Y.2d 865, 429 N.E.2d 411, 444 N.Y.S.2d 904 (1981).

172. See *Firegreen Ltd. v. Claxton*, 160 A.D.2d 409, 553 N.Y.S.2d 765 (1st Dep't 1990); *Anderson Dev. Co. v. Isoreg*, 154 A.D.2d 859, 546 N.Y.S.2d 720 (3d Dep't 1990); *Leiderman Assoc. v. Robotool Ltd.*, 154 A.D.2d 515, 546 N.Y.S.2d 137 (2d Dep't 1990); *Genicom v. Ekco Group*, 160 A.D.2d 551, 554 N.Y.S.2d 202 (1st Dep't 1990); *Murdock v. Arenson Int'l U.S.A.*, 157 A.D.2d 110, 554 N.Y.S.2d 887 (1st Dep't 1990); *Don King v. Buster Douglas*, 735 F. Supp. 522 (S.D.N.Y. 1990).

173. Siegel, *The Affliction Known as Long Arm Jurisdiction*, 199 N.Y.L.J. 5 (1988).

174. 1990 U.S. Dist. LEXIS 10881 (S.D.N.Y. 1990).

related, they were neither purposeful nor designed to avail the defendant of the forum's protections.<sup>175</sup> He also commented that he had "considerable doubt" whether CPLR 302(1) applied in defamation cases.<sup>176</sup> Judge Leval stressed that since subsections (a)(2) and (a)(3) of the statute specifically exclude actions for defamation, there are strong arguments that the legislature intended to bar use of the long-arm statute in defamation cases. He reasoned that since the purpose of the exceptions in CPLR 302(a)(2) and (a)(3) was to avoid unnecessary inhibitions on freedom of speech or the press, an extension of subsection (a)(1) seemed to nullify the protection of nondomiciliaries.<sup>177</sup>

There are few cases in New York applying the "contracts anywhere" provision of CPLR 302(a)(1).<sup>178</sup> In *Melendez v. Professional Machine & Tool*,<sup>179</sup> the question was whether a New York court could assert jurisdiction over a foreign manufacturing company which was neither registered to do business nor doing business in the state, and which did not solicit or have an office telephone or sales representative here. The only contact the defendant had was that it shipped its product into New York.<sup>180</sup> The supreme court found that in addition to shipping its product into New York, the defendant had entered into the contract here and performed it for several years for a New York company.<sup>181</sup> The supreme court did not address an unsettled area of the law to determine whether a mere contract to ship goods FOB to the nondomiciliary seller's place of business provides sufficient minimum contacts.<sup>182</sup>

Once there has been a single contact or contacts between the nondomiciliary defendant and New York, there must be a showing that the cause of action is directly related to and arises from the contact.<sup>183</sup> In *Storch v. Vigneau*,<sup>184</sup> the appellate division for the First

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175. *Id.*

176. *Id.*

177. *Id.*

178. See N.Y. CPLR 302(a)(1) (McKinney 1990); see also *Paradise Prods. Corp. v. Allmark Equip. Co., Inc.*, 138 A.D.2d 470, 526 N.Y.S.2d 119 (2d Dep't 1988) (analyzing the "contracts anywhere" clause of CPLR 302 in terms of due process requirements required to confer jurisdiction over nondomiciliary who contracts outside of New York to provide goods or services to New York).

179. 204 N.Y.L.J. 28 (Sup. Ct., Kings. Co. 1990).

180. *Id.*

181. *Id.*

182. *Id.*

183. See generally WEINSTEIN, KORN & MILLER, *supra* note 92, at §§ 301-16.



Department analyzed this requirement with respect to CPLR 302(a)(1)-(3). Pursuant to section 302(a)(1) the appellate division held that the record was devoid of any evidence that defendant's alleged activities in New York gave rise to the causes of action for which long-arm jurisdiction was sought.<sup>185</sup> With respect to 302(a)(2), the Appellate Division held that the record did not support a finding that the appellant committed a tortious act within New York.<sup>186</sup> The appellate division also held that the requirements of 302(a)(3) had not been satisfied, the fact that plaintiff was domiciled in New York and suffered a loss of income here did not constitute an injury within the state.<sup>187</sup>

*b. CPLR 302(a)(3)*

A prior edition of the *Survey* analyzed the U.S. Supreme Court's holding in *Asahi v. Superior Court of California*.<sup>188</sup> We also discussed the question of what guidance the *Asahi* opinion provides for the New York bar.<sup>189</sup> During the *Survey* year, one distinguished state supreme court judge applied some of the *Asahi* standards to determine if a non-resident defendant was subject to personal jurisdiction in New York.<sup>190</sup> In *Beyer v. Pearl Desk*,<sup>191</sup> Justice Baer held that the *Asahi* standards, relating to the "stream of commerce" minimum contacts test, were dispositive on the issue of jurisdiction. The court dismissed the action against the manufacturer but found disclosure was necessary to determine if the *Asahi* fairness test was met by the supplier, who had a licensing rather than formal distribution arrangement.<sup>192</sup> Justice Baer's approach reminds the practitioner of the importance of

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184. 165 A.D.2d 241, 556 N.Y.S.2d 342 (1st Dep't 1990).

185. *Storch*, 162 A.D.2d at 241, 556 N.Y.2d at 343.

186. *Id.*

187. *Id.* at 242, 556 N.Y.S.2d at 343.

188. See Carlisle, *Civil Practice, 1987 Survey*, *supra* note 89, at 88-97 (1988).

189. *Id.* at 95-98.

190. See *Beyer v. Pearl Desk Co.*, 204 N.Y.L.J.28 (1990) (Sup. Ct., N.Y. Co. 1990).

191. *Id.* (parties did not raise considerations with respect to Part II-B of the *Asahi* opinion, which garnered support of all the United States Supreme Court justices with the exception of Scalia).

192. Jurisdictional disclosure is available under N.Y. CPLR 3211 (d) (McKinney 1970). See generally WEINSTEIN, KORN & MILLER, *supra* note 92, at § 301.07, n.39 (citing *Peterson v. Spartan Indus., Inc.*, 33 N.Y.2d 463, 467, 310 N.E.2d 4513, 515, 354 N.Y.S.2d 905, 908 (1974) (proposition that the Court of Appeals favors jurisdictional discovery)). The bench and bar should note the different standards for disclosure in state and federal practice. In state courts, a good faith conclusory allegation of jurisdiction presents a "sufficient start" to entitle the plaintiff to disclosure on jurisdictional issues. In

developing a detailed record for purposes of preventing a dismissal on jurisdictional grounds.<sup>193</sup> CPLR 3211(d) provides for jurisdictional disclosure.<sup>194</sup> In this respect, it is important to note the different standards for disclosure in state and federal practice. In state courts, good faith conclusory allegations of jurisdiction present a "sufficient start" to entitle the plaintiff to disclosure on jurisdictional issues.<sup>195</sup> In federal courts, the plaintiff must make a prima facie showing of jurisdiction in order to proceed with discovery.<sup>196</sup>

### C. Forum Non Conveniens

Even if a New York state or federal court has subject matter and personal jurisdiction, CPLR 327(a) gives the state court trial judges discretionary power to dismiss the case.<sup>197</sup> Federal district court judges have similar discretion. Unlike state practice, the availability of an alternative forum is an absolute prerequisite for applying the doctrine to dismiss a complaint in federal court.<sup>198</sup> Also, in state practice CPLR 327(b) prohibits dismissal where the action arises out of a contract agreement or undertaking to which section 5-1402 of the General Obligations Law applies.<sup>199</sup>

#### 1. CPLR 327(a)<sup>200</sup>

The two most important opinions applying CPLR 327(a) are

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federal courts, the plaintiff must make a prima facie showing of jurisdiction in order to proceed with discovery.

193. See Carlisle, *Civil Practice, 1987 Survey*, *supra* note 89, at 97-98 (analysis of importance of developing record).

194. See N.Y. CPLR 3211(d) (McKinney 1990). This section, entitled "Facts unavailable to opposing party" provides that:

Should it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just.

See also *Sedig v. Okemo Mountain*, 204 N.Y.L.J. 27 (1990) (Sup. Ct., Nassau Co. 1990) (advertising by Vermont ski resort warranted discovery as to jurisdiction).

195. See *supra* note 192 and accompanying text.

196. *Id.*

197. See *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474, 467 N.E.2d 245, 478 N.Y.S.2d 597 (1984), *cert. denied*, 469 U.S. 1108 (1985).

198. *Islamic Republic*, 62 N.Y.2d at 474, 467 N.E.2d at 245, 478 N.Y.S.2d at 597.

199. See N.Y. CPLR 327(b) (McKinney 1990).

200. See N.Y. CPLR 327(a) (McKinney 1990).

*Highgate Pictures v. DePaul*<sup>201</sup> and *Avnet v. Aetna Casualty & Surety*.<sup>202</sup> In *Highgate* the trial court granted defendant's motion to dismiss on *forum non conveniens* grounds, finding the action had little connection with New York.<sup>203</sup> The contract was largely negotiated in California.<sup>204</sup> It was also executed in California and governed by California law.<sup>205</sup> In addition, the alleged breaches and torts occurred in London and India.<sup>206</sup> The appellate division reversed the trial court basing its decision not to apply *forum non conveniens* on two grounds. First, it found that the trial court abused its discretion in not conditioning the grant of the motion on the availability of an alternative forum.<sup>207</sup> Second, the appellate division placed great emphasis on the defendant's onerous burden when the plaintiff is a New York resident. The First Department stated, "A New York resident plaintiff will not be deprived of its home forum unless it plainly appears that New York is an inconvenient forum and that another is available which will best serve the ends of justice and the convenience of the parties."<sup>208</sup> In *Avnet*, the First Department affirmed the dismissal of plaintiff's complaint on *forum non conveniens* grounds. The plaintiff had sued on incidents occurring at out-of-state waste sites. The appellate division stated that the issuance of insurance policies were issued was but one factor to be considered and did not automatically make New York the most convenient forum.<sup>209</sup> Thus, if the plaintiff is a New York resident it appears that New York courts will be unlikely to grant a dismissal under CPLR 327(a) unless the cause of action is absolutely unrelated to our state.<sup>210</sup> Also the onerous burden of proof is on the moving party.<sup>211</sup>

## 2. Forum Non Conveniens in Federal Court

In *Borden v. Meiji Milk Products*,<sup>212</sup> the Court of Appeals for the

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201. 153 A.D.2d 126, 549 N.Y.S.2d 386 (1st Dep't 1990).

202. 160 A.D.2d 463, 554 N.Y.S.2d 134 (1st Dep't 1990).

203. See *Highgate*, 153 A.D.2d at 128, 549 N.Y.S.2d at 387.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Highgate*, 153 A.D.2d at 128, 549 N.Y.S.2d at 387.

208. *Id.* at 129, 549 N.Y.S.2d at 388 (citations omitted).

209. *Avnet*, 160 A.D.2d at 464, 554 N.Y.S.2d at 135-36.

210. See *id.* at 464, 554 N.Y.S.2d at 135.

211. See *Highgate*, 153 A.D.2d at 129, 549 N.Y.S.2d at 388.

212. 919 F.2d 822 (2d Cir. 1990).

Second Circuit reminded the bench and bar that the simple uniform standard of *Gulf Oil v. Gilbert*<sup>213</sup> permits reversal of a *forum non conveniens* determination only when there has been a very clear abuse of discretion by the district court.<sup>214</sup> The circuit court held that the *Gulf* standard, which relates to the district court's consideration of the private interests of the litigant and the factors of public interest, places heavy reliance on the discretion of the district court in balancing the *Gulf* factors.<sup>215</sup> The circuit court also rejected appellant's argument that the district court erred because appellees failed to meet at the outset their burden of showing the availability of an adequate remedy in Japan.<sup>216</sup> The Second Circuit stated that it does not matter whether the district court considers the availability of an adequate remedy elsewhere at the beginning, the middle, or the end of its written opinion.<sup>217</sup>

### 3. Choice of Forum

In *Banco de Comercio e Industria de Sao Paulo S.A. v. Esusa Engenharia e Construcoes S.A.*,<sup>218</sup> a Brazilian bank, after loaning money to a Brazilian construction company which later went bankrupt, sued the individual Brazilians who guaranteed the corporate obligations. The loan agreement provided that actions could be instituted in New York.<sup>219</sup> Defendants moved to dismiss for lack of jurisdiction. The supreme court denied the motion, holding that Gen. Oblig. Law section 5-1402<sup>220</sup> permitted a New York action for any transaction involving more than \$1 million, since the nonresidents had previously agreed to submit to the jurisdiction of a New York State or federal court.

In *Royal Touch v. Home Shopping Network*,<sup>221</sup> the defendants moved to dismiss for lack of jurisdiction based on a purchase order forum selection clause that gave Florida courts exclusive jurisdiction. When defendants faxed the purchase order to the plaintiff to buy jewelry, they neglected to fax the back of the form that contained the

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213. 330 U.S. 501, 508-09 (1947).

214. See *Borden*, 919 F.2d at 827.

215. *Id.* at 828.

216. *Id.* at 828-29.

217. *Id.*

218. N.Y.L.J., Apr. 30, 1990, at 26, col. 2.

219. *Id.*

220. See N.Y. GEN. OBLIG. LAW § 5-1402 (McKinney 1975).

221. N.Y.L.J., Dec 24, 1990, at 26, col. 4.

contract language and the forum selection clause.<sup>222</sup> The supreme court found no evidence establishing that the parties expressly agreed to the forum selection clause.<sup>223</sup> The court denied the motion and held that since the clause was not faxed, New York was the proper forum.<sup>224</sup>

#### *D. Statutory Requirements for Service of Summons*

Prior *Survey* articles have devoted substantial portions of the jurisdiction section to a recitation of cases showing that New York courts require strict compliance with service of summons and notice provisions.<sup>225</sup> The legislature has enacted CPLR 312-a,<sup>226</sup> which provides for service of summons by first class mail.<sup>227</sup> This experimental statute, which is modeled after Federal Rule of Civil Procedure ("FRCP") 4(c)(2)(c)(11),<sup>228</sup> will probably be permanently enacted prior to its expiration date of Jan. 1, 1992. Last year's *Survey*<sup>229</sup> discussed the new mailing statute, and we have yet to discover a reported case analyzing it. It also appears that many plaintiffs' lawyers are not using the new mailing statute.<sup>230</sup> Once again we remind the bar that service by mail has been extraordinarily successful in federal practice. In this respect we call the reader's attention to *Datskow v. Teledyne*,<sup>231</sup> wherein the Court of Appeals for the Second Circuit held that Rule 4(f) of the FRCP limits mail service under Rule 4(c) to the territorial limits of the state.<sup>232</sup> Since the enactment of CPLR 312-a, extraterritorial service of process is now available in federal court under FRCP 4(e), which permits out-of-state service pursuant to state

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222. *Id.*

223. *Id.*

224. *Id.*

225. See Carlisle, *Civil Practice*, 1989 *Survey*, *supra* note 34, at 92-94; Carlisle, *Civil Practice*, 1988 *Survey*, *supra* note 79, at 101-07; Carlisle, *Civil Practice*, 1987 *Survey*, *supra* note 89, at 111-17; Carlisle, *Civil Practice*, 1986 *Survey*, *supra* note 89, at 93-99.

226. See N.Y. CPLR 312-a (McKinney 1990); see also McLaughlin, *Service by Mail in New York*, N.Y.L.J., Oct. 10, 1989, at 1, col. 1.

227. See Carlisle, *Civil Practice*, 1990 *Survey*, *supra* note 34, at 89-92, for analysis of the new statute.

228. See FED. R. CIV. PRO. 4(c)(2)(c)(ii).

229. See *supra* note 227 and accompanying text.

230. Address by Professor Jay C. Carlisle, Past President's Dinner for the Defense Association of New York (Nov. 13, 1990) (copy on file at the Syracuse University College of Law, H. Douglas Barclay Law Library).

231. 899 F.2d 1298 (2d Cir. 1990).

232. *Datskow*, 899 F.2d at 1302.

law.<sup>233</sup> Also, the practioner is admonished not to try service by mail if there are six or fewer months remaining on the applicable statute of limitations.<sup>234</sup>

No *Survey* on New York Civil Practice would be complete without reference to some of the significant decisions which demonstrate the importance of strictly complying with service statutes.<sup>235</sup> We will briefly mention a few of these cases and highlight an issue of first impression as to whether due process requires personal delivery of process to an alleged criminal contemnor.<sup>236</sup>

### 1. *Strict Compliance*

The strict compliance case of the year is the Court of Appeals' decision in *Flick v. Stewart-Warner*<sup>237</sup> The defendant was a foreign corporation not authorized to do business in the State of New York. Plaintiff mistakenly believed that the defendant was authorized to do business in the State and commenced an action pursuant to Business Corporation Law 306<sup>238</sup> instead of Business Corporation Law 307,<sup>239</sup> which governs service on unauthorized corporations. Plaintiff "effected personal service on the Secretary of State at her office in Al-

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233. *Id.* The Court of Appeals for the Second Circuit held that, absent a state service statute authorizing service by mail, the Federal Rules of Civil Procedure did not specifically authorize service by mail outside the territorial boundaries of the state wherein the district court was located.

234. Address by Professor Jay C. Carlisle, New York State Trial Lawyers Institute CPLR Program (Oct. 20, 1990) (copy of remarks on file at Syracuse Law Review).

235. *See Tropeano v. Astoria Gen. Hosp.*, N.Y.L.J., May 31, 1990, at 30, col. 3 (Sup. Ct., Queens Co.) (medical malpractice suit dismissed for improper service of process); *Ferenz v. Haggerty*, N.Y.L.J., Jan. 3, 1990, at 26, col. 6 (Sup. Ct., Queens Co. 1990) (use of CPLR 308 expedient service options must be proven impractical); *Caputo v. Reed*, N.Y.L.J., Jan. 22, 1990, at 31, col. 4 (Sup. Ct., Queens Co. 1990) (due diligence rules must be met before use of substituted service). *See also Squiers, Judge Rules Improper Service Void Award Against Khashoggi*, N.Y.L.J., June 13, 1990, at 3, col. 1; *Barker, Service of Process on Foreign Corporations*, N.Y.L.J., June 26, 1989, at 3, col. 1; *Freed & Brandes, Service of Process and Ancillary Relief*, N.Y.L.J., May 30, 1990, at 3, col. 1.

236. *See infra* notes 275-294 and accompanying text.

237. 76 N.Y.2d 50, 555 N.E.2d 907, 556 N.Y.S.2d 510 (1990).

238. *See* N.Y. BUS. CORP. LAW § 306(b) (McKinney 1986) (providing that service of process on a foreign corporation authorized to do business in New York is complete when process is served upon the secretary of state).

239. *See* N.Y. BUS. CORP. LAW § 307 (McKinney 1986) (providing that service of process on foreign corporation unlicensed to do business in New York shall be sufficient if notice thereof and a copy of the process are either delivered personally to the foreign corporation without the State or sent to it by registered mail).

bany and thereafter [the] defendant received a copy of the process at its office in Chicago.”<sup>240</sup> Judge Hancock, writing for the Court, posed the question as “whether under these circumstances the court acquired personal jurisdiction over defendant although plaintiff did not send a copy of the process to defendant by registered mail as required by section 307(b)(2) or file the affidavit of compliance required by section 307(c)(2).”<sup>241</sup> The trial court had denied defendant’s motion to dismiss and found that jurisdiction had been acquired. The appellate division had affirmed.<sup>242</sup>

Judge Hancock began by stating that “[t]he question is whether the procedures established in Business Corporation Law section 307 are requirements of a jurisdictional nature which must be strictly satisfied.”<sup>243</sup> He distinguished between service on a foreign corporation authorized to do business in New York and one not so authorized.<sup>244</sup> With respect to the former, Judge Hancock noted that service of process in the State was simple: “There are no theoretical uncertainties concerning the basis for jurisdiction since the foreign corporation is concededly doing business in the State and, indeed, has applied for authority for the express purpose of doing so . . . .”<sup>245</sup> Judge Hancock noted, however, that service of process for unauthorized foreign corporations requires much more to assure that the corporation, in fact, receives a copy of the process.<sup>246</sup> Judge Hancock also observed that “[t]hese are not mere procedural technicalities but measures designed to satisfy due process requirements of actual notice.”<sup>247</sup> Thus, the Court of Appeals held that all of CPLR 307 is jurisdictional and implicitly reminded the bench and bar that all state service statutes are to be strictly construed.<sup>248</sup>

Additional strict compliance cases under CPLR 308<sup>249</sup> and Vehi-

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240. *Flick*, 76 N.Y.2d at 53, 555 N.E.2d at 908, 556 N.Y.S.2d at 511.

241. *Id.*

242. *Id.*

243. *Id.* at 54, 555 N.E.2d at 909, 556 N.Y.S.2d at 512.

244. *Id.* at 55, 555 N.E.2d at 909, 556 N.Y.S.2d at 512.

245. *Flick*, 76 N.Y.2d at 57, 555 N.E.2d at 910, 556 N.Y.S.2d at 513.

246. *Id.* at 56, 555 N.E.2d at 909-10, 556 N.Y.S.2d at 512.

247. *Id.* at 56, 555 N.E.2d at 910, 556 N.Y.S.2d at 513.

248. *See also* *Macchia v. Russo*, 67 N.Y.2d 592, 496 N.E.2d 680, 505 N.Y.S.2d 591 (1986) (Court of Appeals held that there is no reason to extend the clear and unambiguous meaning of service of process statutes). *See generally* *Barker*, *supra* note 235, at 3, col. 1.; *Siegel, Some Warning Flags about Serving Unauthorized Foreign Corporations as Court of Appeals Construes BCL 307 Strictly*, 370 N.Y. ST. DIG., Oct. 1990, at 1, col. 1.

249. *See infra* notes 251-270.

cle and Traffic Law section 253<sup>250</sup> should be noted. In *Broomes-Simon v. Klebanow*,<sup>251</sup> the Appellate Division for the Second Department held that substituted service under 308(2)<sup>252</sup> "leave and mail" was invalid because mailing to the defendant's actual place of business failed to comply with statutory requirements that the envelope containing the papers bear the legend "personal and confidential."<sup>253</sup> In *Dorfman v. Leidner*,<sup>254</sup> the Court of Appeals held that service of process on a member of the defendant physician's office staff was not proper, even if the office staff misrepresented its authority to accept service of process.<sup>255</sup> In *Biological Concepts v. Rudel*,<sup>256</sup> the Third Department also held that service of process on defendant's mother-in-law was not sufficient to allow the court to obtain personal jurisdiction over the defendant.<sup>257</sup> Substituted service under CPLR

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250. See *infra* note 269 and accompanying text.

251. 160 A.D.2d 973, 554 N.Y.S.2d 695 (2d Dep't 1990).

252. See N.Y. CPLR 308(2) (McKinney 1990).

253. The appellate division pointed out that "not only did the envelopes in which the summonses were mailed bear endorsements which arguably violate[d] the statutory prohibition against indications that the sender is an attorney or that the communication 'concerns an action' against the addressee, they [also] failed to bear the legend 'personal and confidential' as required by . . . CPLR 308(2)." *Broomes-Simon v. Klebanow*, 160 A.D.2d at 973, 554 N.Y.S.2d at 696. Thus the appellate division held that "[s]ince the plaintiff's process server failed to comply with the conditions prescribed for the mode of substituted service utilized, jurisdiction over the respondents was not acquired." *Id.*

254. 76 N.Y.2d 956, 563 N.Y.S.2d 728 (1990), *affirming Davidson v. Community Gen. Hosp.*, 158 A.D.2d 748, 551 N.Y.S.2d 340 (3d Dep't 1990).

255. *Davidson*, 158 A.D.2d at 748-49, 551 N.Y.S.2d at 341. Plaintiff's process server averred that he had previously served process on the group of physicians with which defendant practiced on at least 15 occasions, and on each occasion he had served a member of the office staff based on the fact that the process server had been told that the doctors would not come out into the waiting area to accept service, nor would they permit him to enter the rear offices to serve them personally. Plaintiff's process server also stated that the office staff had informed him that they were authorized to accept service on behalf of the doctors. Nonetheless, the appellate division held that service was not properly carried out under CPLR 308(1). The appellate division also rejected the plaintiff's argument that CPLR 308(2) should be applied retroactively to validate the service.

256. 159 A.D.2d 32, 34, 558 N.Y.S.2d 312, 313 (3d Dep't 1990) (service of process on defendant's mother-in-law was not sufficient to allow court to obtain personal jurisdiction over defendant, even though mother-in-law lived in the same apartment building as defendant, where server made only one minimal effort to serve defendant prior to leaving the legal papers with the mother-in-law in her separate apartment).

257. *Biological Concepts*, 159 A.D.2d at 34, 558 N.Y.S.2d at 313. The appellate division held that the mother-in-law was a person of suitable age and discretion within the contemplation of CPLR 308(2) but that the requirements relating to delivery of the summons to a person at the actual dwelling place or usual abode of the person to be served were not met. *Id.*



308(2) requires substituted service to a person at the actual dwelling place or usual place of abode of the person to be served.<sup>258</sup> Since the mother-in-law lived in a different apartment, the service did not strictly comply with the statute.<sup>259</sup>

Several decisions during the *Survey* year demonstrate that CPLR 308(4)<sup>260</sup> "nail and mail" is good old unreliable service.<sup>261</sup> In *Van Raalte v. Metz*,<sup>262</sup> the Appellate Division for the Second Department held that wedging pleadings in the doorway of defendant's residence did not constitute "affixation" to the door of defendant's residence as required by the statute.<sup>263</sup> Similarly, in *Moss v. Corwin*,<sup>264</sup> the Second Department held that affidavits of service were insufficient because there was no evidence that the process servers had made any efforts to ascertain defendant's place of employment or to attempt service there.<sup>265</sup> The Second Department adopted a more flexible approach

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258. See N.Y. CPLR 308(2) (McKinney 1990).

259. *Biological Concepts*, 159 A.D.2d at 34, 558 N.Y.2d at 313. The appellate division noted that had the process server made more persistent efforts, including more visits to the defendant's apartment, perhaps the requirements of CPLR 308(2) may have been met. *Id.*

260. See N.Y. CPLR 308(4) (McKinney 1990).

261. See Farrell, *Good Old Unreliable Service under New York's Nail and Mail Statute*, N.Y.L.J., July 28, 1986, at 1, col. 1 (analyzing service under CPLR 308(4) and concluding that it is always hazardous, because it requires proof of "due diligence" to make service under subsections (1) and (2) of the statute).

262. 161 A.D.2d 760, 556 N.Y.S.2d 112 (2d Dep't 1990).

263. 161 A.D.2d at 760, 556 N.Y.S.2d at 113. The process server testified at a traverse hearing that he affixed the pleadings to the door by means of scotch tape. However, the defendant's wife testified that she found the pleadings wedged in the doorway between the storm door and the door jamb of the front entrance to the residence. This conflicting testimony created an issue of credibility which the supreme court determined in favor of the defendant. The appellate division held that it is well settled that matters of credibility are best determined by the hearing court, whose decision should not be disturbed if supportable by a fair interpretation of the evidence. *Id.*

264. 154 A.D.2d 443, 546 N.Y.S.2d 15 (2d Dep't 1989).

265. *Moss*, 154 A.D.2d at 443, 546 N.Y.S.2d at 16. The process server had on two separate occasions affixed a copy of a summons and verified complaint to the door of the appellant's residence, and another copy had been mailed to the same address. "The nail and mail service in each instance was alleged to have been preceded by three attempts to serve the appellant at his home. Of the six attempts at personal service, all were made on weekdays during normal working hours, except for one attempt at 9:35 p.m." *Id.* The appellate division held that since there was "no evidence in the moving papers that the process servers had made any efforts to ascertain the appellant's place of employment or to attempt service there," the affidavits of service were "insufficient, as a matter of law, to establish that the process servers exercised such due diligence as the statute requires to permit the use of substituted service under CPLR 308(4)." *Id.*

to service under CPLR 308(4) in *Lugo v. Santiago*.<sup>266</sup> In *Lugo*, the defendant claimed that he did not reside at a residence where service was attempted, but the record indicated that residence was the address he provided to police after the automobile accident that was the subject of the action.<sup>267</sup> Defendant also had provided the same address to the Department of Motor Vehicles on his driver's license and license plate registration forms sometime after service was allegedly made. Thus the appellate division held the strict compliance due diligence requirements of CPLR section 308(4) had been satisfied.<sup>268</sup>

In *Cummins-Allison v. Bargarnik* the Civil Court of the City of N.Y. for Kings County held that service of process on an out-of-state motorist was insufficient where the envelope sent to the motorist by certified mail return receipt requested was returned with a notation "Moved forwarding time expired."<sup>269</sup> The court noted that there was no ordinary mailing after return of the certified mailing.<sup>270</sup>

## 2. *Non-Resident Witness at Traverse Subject to Jurisdiction*

In a prior *Survey*, we alerted the bench and bar to a decision of the New York City Civil Court which held that valid re-service of process on defendants conferred jurisdiction notwithstanding the pendency of motions alleging defective original service.<sup>271</sup> Thus, respondents were not immune from re-service while in court contesting the original service.<sup>272</sup> During the *Survey* year, Judge Friedman, in an-

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266. 160 A.D.2d 845, 554 N.Y.S.2d 279 (2d Dep't 1990).

267. *Lugo*, 160 A.D.2d at 845, 554 N.Y.S.2d at 280. The defendant's sworn statement was that he did not reside at the Brooklyn address at the time service was attempted. The appellate division noted that this was the address he provided to the police after the accident. *Id.*

268. *Id.*

269. 146 Misc. 2d 1042, 1043, 553 N.Y.S.2d 981, 982 (N.Y.C. Civ. Ct. 1990).

270. *Cummins-Allison*, 146 Misc. 2d at 1043-44, 553 N.Y.S.2d at 982. The Civil Court noted that the manner of service provided by section 253 "is in derogation of the common law." *Id.* As a result the statute is to be strictly construed. Thus, where the certified mailing has been returned with the notation "address unknown" or "address moved-no forwarding address" or "returned to sender — forwarding time expired" the courts have found that the requirements of section 253 have not been met. *Id.* But see *Stefanini v. Hudson*, N.Y.L.J., May 17, 1990, at 28, col. 5 (Sup. Ct., Queens Co. 1990) (service by certified mail satisfies N.Y. VEH. & TRAF. LAW § 253 if letter is returned unclaimed).

271. See Carlisle, *Civil Practice, 1988 Survey*, *supra* note 79, at 117, n. 327 (discussing Department of Housing Preservation & Dev. v. Koenigsberg, 133 Misc. 2d 893, 509 N.Y.S.2d 270 (N.Y.C. Civ. Ct. 1986)).

272. *Koenigsberg*, 133 Misc. 2d at 897, 509 N.Y.S.2d at 272 (Housing Judge Lewis

other thoughtful opinion, ruled that a New York State resident who does not reside in the City of New York is not immune from service while appearing at the civil court for a traverse.<sup>273</sup> The defendant, a resident of Nassau County, had moved to dismiss the summons and complaint on the ground that since he did not reside in the city, he was immune from service while appearing at the civil court for a traverse. The court denied the motion, holding that the defendant was not immune from service but subject to long-arm jurisdiction under Civil Court Act section 404.<sup>274</sup>

### 3. *Substituted Service on Alleged Criminal Contemnor Does Not Violate Due Process Clause*

In *Morfesis v. Department of Housing Preservation and Development*,<sup>275</sup> the United States District Court for the Southern District of New York was faced with the question of whether the Due Process Clause of the fourteenth amendment required in-hand delivery of process to an alleged criminal contemnor.<sup>276</sup> Morfesis was charged with violation of seven separate orders of a New York Civil Court Housing Judge to provide heat and hot water to seven apartment buildings in Manhattan.<sup>277</sup> The Department of Housing Preservation and Development of the City of New York ("HPD") served applications for criminal contempt on Morfesis pursuant to the leave and mail provisions of CPLR 308(2) and section 110(m) of the New York City Civil

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R. Friedman held that valid reservice of process on the owners conferred jurisdiction notwithstanding the pendency of motions alleging defective original service).

273. *Sekur Alarm Co. v. Samuels*, 205 N.Y.L.J. 95 (N.Y.C. Civ. Ct. 1990).

274. Judge Friedman reasoned that the immunity doctrine is not only applicable to a person coming to New York from out of state. The doctrine is a privilege extended as a matter of public policy to facilitate the administration of justice and to induce nonresidents to come into the state to give testimony. Nonetheless, the doctrine is not applied if the nonresident would be subject to the state's long-arm statute. Judge Friedman concluded that this same reasoning applied to a person not normally subject to the jurisdiction of the civil court but amenable to jurisdiction pursuant to the civil court's long-arm jurisdiction, which is provided for in the Civil Court Act section 404.

275. 733 F. Supp. 745 (S.D.N.Y. 1990).

276. A New York State intermediate appellate court had previously ruled, in an issue of first impression, that leave and mail service was sufficient to commence criminal contempt proceedings. See *Department of Hous. Preservation & Dev. v. 24 W. 132 Equities, Inc.*, 137 Misc. 2d 459, 461-62, 524 N.Y.S.2d 324, 326-27 (Sup. Ct., App. T., 1st Dep't 1987).

277. *Dep't of Hous.*, 137 Misc. 2d at 460, 524 N.Y.S. at 325; see also *Morfesis*, 733 F. Supp. at 746.

Court Act.<sup>278</sup> The service was mailed to and left at the address given to HPD pursuant to the Housing Maintenance Code,<sup>279</sup> which requires registration by the person responsible for the maintenance of a multiple dwelling. Morfesis did not appear at any stage of the contempt proceedings, but an attorney did appear for him.<sup>280</sup> Morfesis claimed that prior to his sentencing hearing, there was no indication that the attorney was expressly or implicitly authorized to appear on his behalf.<sup>281</sup> He also argued that the Due Process Clause required personal in-hand delivery service of process to commence criminal contempt proceedings.<sup>282</sup> The Appellate Term for the First Department rejected his claim and held that personal delivery of process is not required in special proceedings so long as the party charged is notified of the accusation and is afforded a reasonable time to defend.<sup>283</sup> This decision was affirmed by the Appellate Division for the First Department,<sup>284</sup> and the Court of Appeals denied leave to appeal and the U.S. Supreme Court denied certiorari.<sup>285</sup> Morfesis then filed a petition for *habeas corpus* in federal court.<sup>286</sup>

Judge Sand noted that, "while several Supreme Court decisions discuss the issue of notice, none directly address [*sic*] the need for personal service of process."<sup>287</sup> Judge Sand also found that the Due Process Clause of the United States Constitution only requires that a criminal contemnor have notice of the charges and an opportunity to defend.<sup>288</sup> He concluded that leave and mail service provides such reasonable notice.<sup>289</sup>

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278. See N.Y. CITY CIV. CT. ACT § 110(m) (McKinney 1990).

279. Article 41 of the Housing Maintenance Code requires registration by the person responsible for the maintenance of a multiple dwelling.

280. *Morfesis*, 733 F. Supp. at 746.

281. *Id.*

282. *Id.*

283. *Dep't of Hous.*, 137 Misc. 2d at 459, 524 N.Y.S.2d at 324, 326-27.

284. *Dep't of Hous. Preservation & Dev. v. 24 W. 132 Equities, Inc.*, 150 A.D.2d 181, 540 N.Y.S.2d 711 (1st Dep't 1989).

285. *Dep't of Hous. Preservation & Dev. v. 24 W. 132 Equities, Inc.*, 74 N.Y.2d 841, 545 N.E.2d 872, 546 N.Y.S.2d 558 (1989).

286. *Morfesis*, 733 F. Supp. at 745.

287. *Id.* at 746. "When the acts in contempt are not committed in open court, [d]ue process of law . . . requires that the accused should be advised of the charges and have a reasonable opportunity to meet them by way of defense or explanation." *Id.* (quoting *Cooke v. United States*, 267 U.S. 517, 537 (1925)).

288. *Id.* at 747.

289. *Id.* See also *Landlord is Sent to Jail for not Providing Heat*, N.Y. Times, Mar. 10, 1989, at 29, col. 1.; *Devil Slumlord Behind Bars — At Last*, N.Y. Post, Mar. 10, 1990,

The *Morfesis* decision has important policy implications for the Civil Court of New York. There are recurring problems with respect to service of Orders to Show Cause ("OTSC") for contempt in supplementary civil proceedings as a result of the failure of a witness as judgment debtor to appear on the return date of a subpoena issued pursuant to CPLR sections 5223 and 5224.<sup>290</sup> The problem arises when a moving party seeks an OTSC for contempt. When the OTSC is submitted to the clerk's office at Special Term, Part 2, for signature by the judge assigned to the part, the clerks insist that the papers contain "service in-hand" instead of "service pursuant to CPLR section 308."<sup>291</sup> Case law has held that service by any method pursuant to CPLR section 308 is sufficient service and that "in-hand service" under CPLR section 308(1) is not required.<sup>292</sup> Therefore, the service requirement for OTSC civil contempt cases in Civil Court are more stringent than those required by statute and the applicable case law.<sup>293</sup> This is particularly true since the OTSC requests are for civil contempt and are, therefore, clearly subject to a lower due process standard. The administrative judges of the New York Civil Court should comply with the law of the state of New York.<sup>294</sup>

## V. STATUTE OF LIMITATIONS

New York courts issued important opinions relating to the continuous treatment doctrine,<sup>295</sup> the foreign object exception,<sup>296</sup> the borrowing statute,<sup>297</sup> the application of CPLR section 203(b)(5) in

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at 4, col. 2. See generally Barker, *A Review of the Contempt Process*, 202 N.Y.L.J. 121 (1989) (presenting outline review of the contempt process in New York State).

290. N.Y. CPLR 5223 - 5224 (McKinney 1990).

291. *Id.*

292. See *supra* notes 283-286 and accompanying text. See also Dep't of Hous. Preservation & Dev. of the City of N.Y. v. Arick, 131 Misc. 2d 950, 503 N.Y.S.2d 489 (N.Y.C. Civ. Ct. 1986).

293. In *Arick*, Judge Friedman held that the term "personal service" did not require "in-hand personal delivery", and that service of an OTSC pursuant to any APLR 308 method would be sufficient. *Id.* at —, 503 N.Y.S.2d at 492. See also CPLR MANUAL, *supra* note 138 (standing for proposition that the term "personal service" does not mean in-hand delivery of process).

294. See *supra* notes 283-286 and accompanying text. The issue is what the law permits rather than what standards the administrative judges deem appropriate.

295. See *Jorge v. New York City Health & Hosp. Corp.*, 164 A.D.2d 650, 563 N.Y.S.2d 411 (1st Dep't 1991).

296. See *Rodriguez v. Manhattan Medical Group, P.C.*, 77 N.Y.2d 217, 567 N.E.2d 235, 566 N.Y.S.2d 193 (1990).

297. See *Singer v. Eli Lilly & Co.*, 153 A.D.2d 210, 549 N.Y.S.2d 654 (1st Dep't

federal court,<sup>298</sup> and the question of whether an action against hospital staff is governed by a three year or two and one half year statute of limitations.<sup>299</sup> The Court of Appeals for the Second Circuit also adopted a uniform federal limitations period for some private securities claims.<sup>300</sup>

### A. Foreign Object Exception

If a foreign object has been left in the patient's body, the statute of limitations will not begin to run until the patient could have reasonably discovered the malpractice.<sup>301</sup> If the exception applies, the action must be commenced within one year of the actual or imputed discovery.<sup>302</sup> We have previously pointed out that the Court of Appeals has narrowly applied the foreign object exception.<sup>303</sup> During the *Survey* year the Court refused to extend the exception to the statute of limitations in medical malpractice actions to include undetected intrauterine devices.<sup>304</sup> This decision resolved a conflict between appellate decisions in the First and Second Departments.<sup>305</sup>

Judge Titone, writing for a unanimous court in *Rodriguez v. Manhattan Medical Group, P.C.*,<sup>306</sup> framed the issue as to whether a "fixation device" originally implanted in a patient's body for a specific treatment purpose is transformed into a "foreign object" within the meaning of the foreign object exception when a physician retained to remove it negligently fails to do so.<sup>307</sup> The Court reviewed *Flanagan*

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1990), *aff'g*, *Besser v. E.R. Squibb & Sons, Inc.*, 146 A.D.2d 107, 539 N.Y.S.2d 734 (1st Dep't 1989).

298. *See Datskow*, 899 F.2d at 1298.

299. *See Halas v. Parkway Hosp.*, 158 A.D.2d 516, 551 N.Y.S.2d 279 (2d Dep't 1990).

300. *See Ceres Partners v. Gel Assocs.*, 918 F.2d 349 (2d Cir. 1990).

301. N.Y. CPLR 214-a (McKinney 1990).

302. *Id.*

303. *See Carlisle, Civil Practice, 1986 Survey, supra* note 89, at 103-04.

304. *See Rodriguez*, 77 N.Y.2d 217, 567 N.E.2d 235, 566 N.Y.S.2d 193.

305. In *Sternberg v. Gardstein*, 120 A.D.2d 93, 508 N.Y.S.2d 14 (2d Dep't 1986), the Appellate Division for the Second Department held that an IUD became or took on the character of a foreign object when the defendant performed an abortion and tubal ligation sterilization procedure but negligently failed to remove the IUD. The plaintiff's medical malpractice action, therefore, accrued when the IUD was or could reasonably have been discovered by the patient. The Appellate Division for the First Department took a different position as evidenced by its decision in *Rodriguez*, 155 A.D.2d 114, 552 N.Y.S.2d 947 (1st Dep't 1990).

306. 77 N.Y.2d 217, 567 N.E.2d 235, 566 N.Y.S.2d 193.

307. *Id.* at 218-19, 567 N.E.2d at 236, 566 N.Y.S.2d at 194.

*v. Mount Eden General Hospital*<sup>308</sup> and its progeny,<sup>309</sup> and then concluded that the foreign object exception was very narrow.<sup>310</sup> The Court also examined the history of CPLR section 214-a and concluded that the legislature intended to limit a foreign object to one that the doctor does not intend to leave inside the body.<sup>311</sup> Thus Judge Titone held that the IUD did not become a foreign object when defendants failed to remove it after having been retained to do so.<sup>312</sup> The Court of Appeals also distinguished IUD cases from its earlier holding in *Flanagan* on the following grounds: (1) the IUD claim, unlike the claim in *Flanagan*, clearly rested on defendants' alleged negligence in exercising professional diagnostic judgment or discretion;<sup>313</sup> (2) a claim based on injuries arising from a failure to diagnose such as that asserted by the IUD plaintiffs involves a far more problematic chain of causation than one based on injuries arising from the negligent implantation of a surgical instrument or other foreign object;<sup>314</sup> and (3) in contrast to the *Flanagan* case, IUD actions raise credibility questions.<sup>315</sup> These questions require the fact-finder to assess conflicting evidence as to whether the defendant-physician's diagnostic methods and conclusions were consistent with contemporary professional standards of care.<sup>316</sup>

The bottom line is that the Court of Appeals continues its long

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308. 24 N.Y.2d 427, 248 N.E.2d 871, 301 N.Y.S.2d 23 (1969).

309. See *Rodriguez*, 77 N.Y.2d at 220-21, 567 N.E.2d at 237, 566 N.Y.S.2d at 195. See, e.g., *Merced v. New York City Health & Hosp. Corp.*, 56 A.D.2d 553, 391 N.Y.S.2d 863, *rev'd*, 44 N.Y.2d 398, 377 N.E.2d 453, 406 N.Y.S.2d 9 (1977) (negligently performed tubal ligation discovered following emergency surgery for ectopic pregnancy); *Matter of Smalls v. New York City Health & Hosp. Corp.*, 55 A.D.2d 537, 389 N.Y.S.2d 372, *rev'd*, 44 N.Y.2d 398, 377 N.E.2d 453, 406 N.Y.S.2d 9 (1978) (lesion caused by negligently performed cervical myelogram); *Dobbins v. Clifford*, 39 A.D.2d 1, 330 N.Y.S.2d 743 (1972) (damage to pancreas during course of operation to remove spleen); *Murphy v. St. Charles Hosp.*, 35 A.D.2d 64, 312 N.Y.S.2d 978 (1970) (malfunction in surgically implanted prosthetic device). But see *Schiffman v. Hosp. for Joint Diseases*, 36 A.D.2d 31, 319 N.Y.S.2d 674 (1971) (declining to apply *Flanagan* rule to erroneous diagnosis of malignancy).

310. *Rodriguez*, 77 N.Y.2d at 221-22, 567 N.E.2d at 238, 566 N.Y.S.2d at 196 ("Our continuing commitment to that premise [that *Flanagan* not be broadened beyond its existing confines] has been reiterated on many occasions, and in several different contexts.").

311. *Id.* at 222, 567 N.E.2d at 238, 566 N.Y.S.2d at 196.

312. *Id.*

313. See *Rodriguez*, 77 N.Y.2d at 223, 567 N.E.2d at 239, 566 N.Y.S.2d at 197.

314. *Id.*

315. *Id.*

316. *Id.*

tradition of narrowly applying statutes of limitations and deferring to the legislature to correct any wrongs.<sup>317</sup>

*B. CPLR 214-a: The Continuous Treatment Doctrine*

The applicability of the continuous treatment doctrine requires that there be more than merely a continuing relationship between the physician and the patient.<sup>318</sup> The underlying rationale is the existence of a "continuing trust and confidence" which warrants the tolling of the limitations period.<sup>319</sup> In this respect, courts restrictively read CPLR section 214-a.<sup>320</sup> Thus continuous treatment contemplates "scheduled appointments" for "future visits" and not merely a written request by a physician to see his patient seven months after surgery was performed.<sup>321</sup> In addition, absent a clear agency relationship, the doctrine cannot be imputed from one doctor to another.<sup>322</sup> Finally, treatment is not considered continuous when the interval between treatments exceeds the two and one half year limitation period.<sup>323</sup>

In *Jorge v. New York City Health and Hospitals*,<sup>324</sup> the Appellate Division for the First Department reinstated a medical malpractice

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317. See *Goldsmith v. Howmedica, Inc.*, 67 N.Y.2d 120, 491 N.E.2d 1097, 500 N.Y.S.2d 640 (1986) (holding that the statute of limitations in a medical malpractice action based on a malfunctioning prosthetic device begins to run when the device is installed and not from the time a patient is injured); *In re Steinhardt v. Johns-Manville Sales Corp.*, 54 N.Y.2d 1008, 430 N.E.2d 1297, 446 N.Y.S.2d 244 (1981), *cert. denied*, 456 U.S. 967 (1982); *Thornton v. Roosevelt Hosp.*, 47 N.Y.2d 780, 391 N.E.2d 1002, 417 N.Y.S.2d 920 (1979).

318. See *Richardson v. Orentreich*, 64 N.Y.2d 896, 898, 477 N.E.2d 210, 211, 487 N.Y.S.2d 731, 732 (1985) (citing *Coyne v. Bersani*, 61 N.Y.2d 939, 940, 463 N.E.2d 371, 372, 474 N.Y.S.2d 970, 971 (1984)).

319. *Richardson*, 64 N.Y.2d at 898, 477 N.E.2d at 211, 487 N.Y.S.2d at 732.

320. See N.Y. CPLR 214-a (McKinney 1990).

321. *DePeralta v. Presbyterian Hosp.*, 121 A.D.2d 346, 503 N.Y.S.2d 788 (1st Dep't 1986). *But see Ward v. Kaufman*, 120 A.D.2d 929, 502 N.Y.S.2d 883 (4th Dep't 1986) (doctor's telephone call to plaintiff approximately two weeks after he applied a left tibial cast brace to her leg qualified as continuous treatment).

322. See *Modzelewski v. Kingsbrook Jewish Medical Center*, 120 A.D.2d 498, 501 N.Y.S.2d 699 (2d Dep't 1986); *Otero v. Presbyterian Hosp.*, 116 A.D.2d 511, 497 N.Y.S.2d 381 (1st Dep't 1986).

323. See *Sherry v. Queens Kidney Center*, 117 A.D.2d 663, 664, 498 N.Y.S.2d 401, 402 (2d Dep't 1986).

324. 164 A.D.2d 650, 563 N.Y.S.2d 411 (1st Dep't 1990). Plaintiff's suit had been dismissed in Supreme Court in Manhattan on the ground that the statute of limitations began running seven months before the youngster's birth, which was on the date when his father's test for the sickle-cell trait was allegedly misread. The youngster's mother, who knew she was a carrier of the genetic trait for sickle-cell anemia, sought the testing of her



claim brought on behalf of a five year old male born with sickle-cell anemia.<sup>325</sup> The appellate division held that the one-year-and-90 days statute of limitations for filing an action against a municipal defendant was tolled by the doctrine of continuous treatment until the boy's birth because his mother had sought and received genetic counselling regarding a specific condition, and the time limit did not begin to run until the pregnancy was terminated.<sup>326</sup> In a strong dissent, Justice Wallach stated that the majority had engaged in an inappropriate expansion of the continuous treatment doctrine to reach a sympathetic result on behalf of the plaintiffs.<sup>327</sup>

### C. CPLR 203(b)(5)

Last year's *Survey* pointed out that the sixty-day extension under CPLR section 203(b)(5) was applicable in federal diversity cases.<sup>328</sup> We pointed out that courts had yet to resolve the question of whether delivery to the federal district court clerk also earned the time extension.<sup>329</sup> In *Datskow v. Teledyne*,<sup>330</sup> the Court of Appeals for the Second Circuit held that service can be made on the federal marshal instead of the county sheriff and the district court clerk instead of the county clerk.<sup>331</sup> The circuit court noted that this service does not impair any state interest in establishing limitations on time for the suit.<sup>332</sup> Moreover, the circuit court stated that "the clerk of a district court may serve as the depository for a summons [under CPLR section 203(b)(5)], whether the relevant county is within or without New

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husband and when informed that he was negative, she decided to proceed with the pregnancy and gave birth to her son. *Id.*

325. When the tests demonstrated that the baby had the disease, plaintiffs alleged that the father was tested again and found to be a carrier of the sickle-cell trait. *Id.* at 652, 563 N.Y.S.2d at 413.

326. *Id.* at 652, 563 N.Y.S.2d at 413.

327. Justice Wallach, in his dissent, emphasized that the medical care rendered to Ms. Jorge was "routine prenatal care, wholly unrelated to sickle-cell anemia" and, therefore, the requirement that there be continuous treatment for the same illness, injury or condition which gave rise to the alleged malpractice was not satisfied. *Id.* at 653-54, 563 N.Y.S.2d at 414.

328. See *Personis v. Oiler*, 889 F.2d 424 (2d Cir. 1989) (Court of Appeals for the Second Circuit held that there was nothing in the text of CPLR 203(b)(5) that confines its effect to state court suits. The circuit court also stated that it had not located any legislative history suggesting such a limitation.)

329. See Carlisle, *Civil Practice, 1989 Survey*, *supra* note 34, at 104-05.

330. 899 F.2d 1298 (2d Cir. 1990).

331. *Id.* at 1304.

332. *Id.*

York City.”<sup>333</sup> A contrary result would, for example, create two separate rules within the Eastern District of New York, one for cases within New York City and another for cases outside New York City.

*D. CPLR 214-a: Definition of the Term “Medical Malpractice”*

Last year’s *Survey* discussed the Court of Appeals’ decision in *Scott v. Uljanov*,<sup>334</sup> which held that a claim against a hospital for negligent supervision was subject to a two-and-one-half year limitations period instead of a three-year period.<sup>335</sup> During the *Survey* year, several appellate division opinions have distinguished the *Scott* holding.<sup>336</sup> In *Halas v. Parkway Hospital*,<sup>337</sup> the Appellate Division for the Second Department held that a claim that the hospital was negligent in permitting a patient to remain in a hospital bed which lacked proper and adequate side rails, and in failing to supervise the patient properly, sounded in ordinary negligence.<sup>338</sup> Thus, the patient was not barred from stating specific monetary damages in his *ad damnum* clauses of the complaint.<sup>339</sup> Two months earlier, the Second Department reached a contrary result in *Raus v. White Plains Hospital*.<sup>340</sup> In *Raus*, the appellate division believed that the action was based upon an improper assessment of the plaintiff’s condition and, therefore, bore a substantial relationship to the rendition of medical treatment. As a result, the action was deemed malpractice rather than negligence.<sup>341</sup> The bottom line may depend on how the practitioner pleads

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333. *Id.*

334. 74 N.Y.2d 673, 541 N.E.2d 398, 543 N.Y.S.2d 369 (1989).

335. Plaintiff sustained an injury while in a bed in the emergency room. Almost three years later, he sued the hospital which claimed that his suit was a medical malpractice claim and, therefore, barred by the two and one-half year period under CPLR 214-a. The Court of Appeals unanimously held the claim to be one of malpractice and dismissed it. The Court reasoned that the hospital’s supervision and treatment of a patient during his initial emergency room care constituted an integral part of the process of rendering medical treatment to him.

336. See *infra* notes 337-341 and accompanying text.

337. 158 A.D.2d 516, 551 N.Y.S.2d 279 (2d Dep’t 1990).

338. The appellate division stated that “[h]ere, the gravamen of the complaint did not involve diagnosis, treatment or the failure to follow a physician’s instruction. . . . The facts presented in this case establish that the patient’s condition was delicate and a risk of harm was recognized.” *Halas*, 158 A.D.2d at 516, 551 N.Y.S.2d at 280.

339. *Id.* at 517, 551 N.Y.S.2d at 280 (“Since the nature of the conduct complained of may readily be assessed based upon common everyday experience of the trier of facts, the court properly determined that the action sounded in ordinary negligence.”).

340. 156 A.D.2d 354, 548 N.Y.S.2d 307 (2d Dep’t 1989).

341. Plaintiff received a sedative and about nine hours later fell out of the hospital

his case.

### *E. CPLR 202: The Borrowing Statute*

CPLR 202 applies to actions brought by nonresidents based on causes of action which occurred outside New York.<sup>342</sup> These actions are subject to the limitation periods of New York and of the state in which they accrued and, thus, are barred if either period has expired. Last year's *Survey*<sup>343</sup> discussed the Appellate Division for the First Department's decision in *Besser v. E.R. Squibb & Sons*<sup>344</sup> and promised to report on it this year. The Court of Appeals, without comment, ruled 6-0 to affirm the appellate division.<sup>345</sup> Thus, it limited the number of women who can pursue DES related court claims against pharmaceutical companies under the state's toxic tort law.

### *F. Uniform Federal Statute of Limitations for Some Private Securities Actions*

In *Ceres Partners v. Gel Associates*,<sup>346</sup> the Court of Appeals for the Second Circuit adopted a uniform federal limitations period for private securities claims under sections 10b and 14 of the Securities and Exchange Act of 1934.<sup>347</sup> Thus, claims must be commenced within one year of discovering the alleged wrongful conduct and within three years of the conduct's occurrence. The circuit court noted that century-old precedent required federal courts to borrow whatever period one state court would conclude a sister state's court might apply in a case over which neither has any jurisdiction.<sup>348</sup> The court also noted that the practice of looking to state law to determine the applicable statute of limitations for implied causes of action under the federal securities laws has been the target of considerable criti-

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bed and sustained injuries. The appellate division stated, "[t]he plaintiff's claim in this case is premised on an alleged improper assessment of her condition and as such bears a substantial relationship to the rendition of her medical treatment."

342. See CPLR MANUAL, *supra* note 138, at § 207.

343. See Carlisle, *Civil Practice*, 1989 *Survey*, *supra* note 34, at 103.

344. 146 A.D.2d 107, 539 N.Y.S.2d 734 (1st Dep't 1990) (holding that the one year revivor statute in CPLR 214-c did not apply to a claim of a nonresident of New York).

345. See *Besser v. E.R. Squibb & Sons, Inc.*, 75 N.Y.2d 847, 552 N.E.2d 171, 552 N.Y.S.2d 923 (1990).

346. 918 F.2d at 349.

347. See *id.*

348. See *id.* at 352 (citing *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985)).

cism.<sup>349</sup> The court explained that far from achieving any semblance of national uniformity, reference to state laws generally results in a lack of uniformity even within a given circuit.<sup>350</sup> The circuit court also observed that while the U.S. Supreme Court has noted the prevailing practice of borrowing state law for limitations periods for federal securities law claims, it has not explicitly approved the practice, and its recent discussions of such borrowing for other types of claims appear to leave open the possibility that the courts should look to a federal statute instead.<sup>351</sup>

The circuit court did not address the issue of whether the new limitation should be applied retroactively. In *Finkel v. Stratton*,<sup>352</sup> however, a federal district court held that it would be "inequitable to apply *Ceres* retroactively so as to transform an action, timely when filed, into one barred forever by the statute of limitations."<sup>353</sup> As a result, the district court held that New York investors had timely filed their complaint within the six years allowed under the New York State statute of limitations. Also regarding *Welch v. Cadre Capital*,<sup>354</sup> which has been argued before the Second Circuit, the court is expected to rule that the new uniform statute of limitations cannot be applied retroactively.<sup>355</sup>

## VI. RES JUDICATA

Prior *Survey* articles<sup>356</sup> have discussed the substantial develop-

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349. *Id.* at 355 (citing *Kronfeld v. Advest, Inc.*, 675 F. Supp. 1449, 1457-58 & n. 21 (S.D.N.Y. 1987) (applying a total of 26 separate statutes of limitations)).

350. *Id.* at 354.

351. *Ceres*, 918 F.2d at 355 (citing *Agency Holding Corp. v. Malley-Duff & Assocs., Inc.* 483 U.S. 143 (1987). The United States Supreme Court ruled that a uniform statute of limitations, borrowed from the Clayton Act, should be applied to civil RICO actions. The Court then explained that among the themes to be distilled from the Supreme Court's recent borrowing discussions are that selection of a uniform federal limitations period may be warranted (1) where the statutory claim in question covers a multiplicity of types of actions, leading to the possible application of a number of different types of state statutes of limitations; (2) where the federal claim does not precisely match any state-law claim; (3) where the challenged action is multi-state in nature, perhaps leading to forum shopping and inordinate litigation expense; and (4) where a federal statute provides a very close analogy. *See generally id.*

352. 754 F. Supp. 318 (S.D.N.Y. 1990).

353. *Finkel*, 754 F. Supp. at 332.

354. 923 F.2d 989 (2d Cir. 1991).

355. *See Welch*, 923 F.2d at 989.

356. *See Carlisle, Civil Practice, 1989 Survey, supra* note 34, at 112-15; Carlisle, *Civil*

ments in the doctrines of claim preclusion<sup>357</sup> and issue preclusion<sup>358</sup> with respect to civil litigation in New York. During the *Survey* year, courts continued to vigorously apply these doctrines to conserve judicial resources and to clear crowded dockets.<sup>359</sup> In one case of first impression, the Court of Appeals for the Second Circuit applied issue preclusion to prevent a party from re-litigating the validity of a state court sanction and contempt order.<sup>360</sup> In a contested matrimonial matter, the Appellate Division for the First Department invoked issue preclusion to bar one spouse from re-litigating an earlier support order.<sup>361</sup> In *Milltex Industries v. Jacquard Lace*,<sup>362</sup> the Second Circuit reminded the bench and the bar that federal district courts in the Circuit must give res judicata effect to state court judgments.<sup>363</sup> Also in

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*Practice*, 1988 *Survey*, *supra* note 79, at 120-26; Carlisle, *Civil Practice*, 1987 *Survey*, *supra* note 89, at 107-18; Carlisle, *Civil Practice*, 1986 *Survey*, *supra* note 225, at 141-48.

357. Under the doctrine of claim preclusion, a final judgment on the merits bars a subsequent action between the parties, or persons in privity with them, from relitigating the same cause of action. It bars the relitigation of claims which might have been litigated, as well as those which actually were litigated. *See* O'Brien v. City of Syracuse, 54 N.Y.2d 353, 429 N.E.2d 1158, 445 N.Y.S.2d 687 (1981); Smith v. Russell Sage College, 54 N.Y.2d 185, 429 N.E.2d 746, 445 N.Y.S.2d 68 (1981).

358. As the doctrine of issue preclusion now stands, a valid final judgment on the merits rendered by a court of competent jurisdiction prevents relitigation by the parties or their privies of matters of fact or law actually litigated or necessarily determined in the earlier action. Two prerequisites must be met to apply the doctrine in New York courts. "First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded . . . must have had a full and fair opportunity to contest the prior determination." Kaufman v. Eli Lilly & Co., 65 N.Y.2d 449, 453, 482 N.E.2d 63, 66, 492 N.Y.S.2d 584, 588 (1985).

359. *See* Zapata v. Town of Huntington, 203 N.Y.L.J. 106 (Sup. Ct., Suff. Co. 1990) (dismissal of federal civil rights claim bars state tort suit on same facts); Caruso & Sons Elec. Contracting, Inc. v. City of N.Y. Dep't of Bldgs., N.Y.L.J., Sept 6, 1990, at 21, col. 6; Gangitano v. TCI Constr. Corp., N.Y.L.J., Sept. 6, 1990, at 18, col. 2 (set-off to Pennsylvania mechanic's lien bars New York breach-of-contract suit); Glass v. Glass, N.Y.L.J., Apr. 30, 1990, at 30, col. 2 (issue of title to marital residence is barred by claim preclusion); Marcic v. Verkooyen, N.Y.L.J., Apr. 12, 1990, at 32, col. 6 (agency determination precludes relitigation of same issue in court). *See also* Dachs & Dachs, *Collateral Estoppel and Res Judicata in Arbitration*, N.Y.L.J., Feb. 13, 1990, at 3, col. 4; Barker, *New York Practice: Collateral Estoppel*, N.Y.L.J., Apr. 23, 1990, at 3, col. 1. *See generally*, Silver, *In Lieu of Preclusion: Reconciling Administrative Decision-making and Federal Civil Rights Claims*, 65 IND. L.J. 367 (1990).

360. Polur v. Raffae, 912 F.2d 52 (2d Cir. 1990).

361. Labow v. Labow, 154 A.D.2d 90, 550 N.Y.S.2d 889 (1st Dep't 1990).

362. 922 F.2d 164 (2d Cir. 1991).

363. An Alabama state court rendered a decision several days before the district court in New York; the Second Circuit held that the Alabama judgment must be given claim preclusion effect. *Id.*

*Lytle v. Household Manufacturing*,<sup>364</sup> the United States Supreme Court refused to give issue preclusion effect to a district court's determination of issues common to equitable and legal claims under Title VII of the 1964 Civil Rights Act<sup>365</sup> and 42 U.S.C. section 1981.<sup>366</sup> The Court held that the prior holding in *Parklane Hosiery v. Shore*,<sup>367</sup> that a court's determination of issues in an equitable action could collaterally estop re-litigation of the same issues in a subsequent legal action without violating a litigant's right to a jury trial, could not be extended to the *Lytle* actions.<sup>368</sup> These decisions demonstrate that the practitioner must be alert to the adverse consequences of the doctrine.<sup>369</sup>

The most important res judicata developments during the *Survey* year relate to the recent expansion of the scope of issue preclusion by applying the doctrine to prior criminal issue determinations in order to preclude subsequent civil litigation.<sup>370</sup> This is particularly true with respect to convictions based on guilty pleas.<sup>371</sup> The Court of Appeals decision in *D'Arata v. New York Central Mutual Fire Insurance*<sup>372</sup> and two opinions by the Appellate Division for the Second Department<sup>373</sup> will be analyzed.

### A. Background

In the case of *S.T. Grand v. City of New York*,<sup>374</sup> the Court of Appeals first applied the doctrine of issue preclusion to a criminal

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364. 110 S. Ct. 1331 (1990).

365. See Title VII of the Civil Rights Act of 1964, 78 Stat. 253, 42 U.S.C. § 2000e (1982).

366. See 42 U.S.C. § 1981 (1988).

367. 439 U.S. 322 (1979).

368. In *Parklane*, the Supreme Court held that a prior resolution of issues collaterally estopped relitigation of the same issues in a second, separate action, even though the plaintiff was entitled to a jury trial in the second action. The Court refused to extend the *Parklane* doctrine because the *Lytle* case involved only one suit in which the plaintiff properly joined his legal and equitable claims.

369. See generally Carlisle, *Getting a Full Bite of the Apple*, 55 FORDHAM L. REV. 63 (1986).

370. See Carlisle, *Issue Preclusion Effect of Criminal Convictions in Subsequent Civil Litigation*, 17 WESTCHESTER B.J. 207 (1990); see also *infra* notes 370-417.

371. See Carlisle, *Issue Preclusion*, *supra* note 370, at 212-13.

372. 76 N.Y.2d 659, 564 N.E.2d 634, 563 N.Y.S.2d 24 (1990).

373. See *Sullivan v. Breese*, 160 A.D.2d 997, 554 N.Y.S.2d 937 (2d Dep't 1990); *Allstate Ins. Co. v. Zuk*, 160 A.D.2d 971, 554 N.Y.S.2d 939 (2d Dep't 1990).

374. 32 N.Y.2d 300, 298 N.E.2d 105, 344 N.Y.S.2d 938 (1973).

conviction in order to preclude subsequent civil litigation.<sup>375</sup> S.T. Grand, Inc. was convicted in federal court of conspiracy to use interstate facilities with intent to violate the New York State bribery laws. The conviction stemmed from illegal activity on the part of S.T. Grand concerning a contract with New York City for the cleaning of a reservoir. Following the conviction, S.T. Grand sued the city for the unpaid balance due on the contract. The city filed a counterclaim for monies previously paid on the contract. Although the contract had been performed by S.T. Grand, the city moved for a summary judgment on the grounds of issue preclusion. It argued that S.T. Grand's criminal conviction was proof that the contract was illegal and there was no triable issue of fact. Special Term denied the summary judgment motion, but the Appellate Division reversed and directed a verdict for the defendant.<sup>376</sup> Plaintiff appealed, and the Court of Appeals found that the doctrine of issue preclusion was applicable because issues necessarily decided in the criminal action were decisive to the civil action.<sup>377</sup>

In *Gilberg v. Barbieri*,<sup>378</sup> the Court of Appeals qualified its holding in *S.T. Grand*. A divided court held that an harassment conviction for assault would not preclude re-litigation of the identical issue in a civil lawsuit because the defendant demonstrated that the full and fair opportunity requirement had not been satisfied.<sup>379</sup> The *Gilberg* court held that the defendant could not foresee that his conviction on

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375. See *S.T. Grand*, 32 N.Y.2d at 300, 298 N.E.2d at 105, 344 N.Y.S.2d at 938.

376. *Id.*

377. *Id.* at 304, 298 N.E.2d at 107, 344 N.Y.S.2d at 941.

378. 53 N.Y.2d 285, 423 N.E.2d 807, 441 N.Y.S.2d 49 (1981).

379. See *Gilberg*, 53 N.Y.2d at 294, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. The Court of Appeals framed the issue as "whether a conviction for the petty offense of harassment can later be used to preclude the defendant from disputing the merits of a civil suit for assault, involving the same incident and seeking a quarter of a million dollars." *Id.* at 288, 423 N.E.2d at 807, 441 N.Y.S.2d at 49. A divided Court of Appeals refused to give conclusive effect to the prior determination beyond the proceeding in which it was made. See *id.* at 292, 423 N.E.2d at 809, 441 N.Y.S.2d at 51. The majority found that the defendant was afforded neither an opportunity nor an incentive to litigate the harassment conviction thoroughly or as he might have if more were at stake. *Id.* at 293, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. The Court of Appeals noted that a contrary ruling would encourage civil litigants to file criminal complaints which would frustrate the very purpose of res judicata. *Id.* at 294, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. The Court also observed that future parties would be compelled to defend minor criminal charges with a vigor out of proportion to the charge and at variance with the proper function of the local criminal courts. *Gilberg*, 53 N.Y.2d at 294, 423 N.E.2d at 810, 441 N.Y.S.2d at 52.

a violation would later be used to establish conclusive liability in a \$250,000 personal injury suit. Therefore, he was not accorded a full and fair opportunity to litigate the issue.<sup>380</sup> The Court of Appeals also emphasized the brisk and informal manner of the prior hearing and observed that the defendant had neither the opportunity nor the incentive to litigate as thoroughly as he might have if the stakes had been greater.<sup>381</sup> In later cases, New York courts began to apply the doctrine of issue preclusion to criminal convictions based on guilty pleas.<sup>382</sup> Courts held that a plea may preclude subsequent re-litigation in a civil action of issues necessarily decided and actually litigated in prior criminal proceedings.

### B. D'Arata, Zuk, and Sullivan

In *D'Arata*,<sup>383</sup> the plaintiff, a shooting victim, sought to recover from the insurer of the assailant the amount of a default judgment obtained against the insured.<sup>384</sup> The insured had been convicted after

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380. *Id.*

381. *Id.* at 293, 423 N.E.2d at 810, 441 N.Y.S.2d at 52. See *Parklane*, 439 U.S. at 330 (it may be unfair to permit offensive use of collateral estoppel if defendant in first action was sued for nominal or small damages and subsequent lawsuit is unforeseeable because he may not have incentive to "defend vigorously").

382. See *Abraho v. Perrault*, 147 A.D.2d 824, 537 N.Y.S.2d 913 (3d Dep't 1989) (defendant pled guilty to two counts of vehicular manslaughter as a result of an auto accident; In a subsequent civil action, the court held that defendant's guilty plea precluded him from relitigating the issue of his negligence concerning the accident); *Merchants Mut. Ins. Co. v. Arzillo*, 98 A.D.2d 495, 472 N.Y.S.2d 97 (2d Dep't 1984) (appellate division recognized that there was no actual "litigation" involved in regard to the defendant's guilty plea, but still found that "the issues have necessarily been judicially determined by the plea so that the criminal defendant is estopped to contest them in subsequent civil litigation"). See also *Gerney v. Tishman Constr. Corp.*, 136 Misc. 2d 105, 518 N.Y.S.2d 654 (Sup. Ct., N.Y. Co. 1987) (crane operator pled guilty to second degree criminal assault, and in subsequent civil suit for personal injuries, plaintiff's summary judgment motion was granted on the grounds that the identity of issue and full and fair opportunity requirements had been satisfied); *McMillan v. Williams*, 116 Misc. 2d 171, 455 N.Y.S.2d 523 (Sup. Ct., N.Y. Co. 1982). In *McMillan*, the defendant had been convicted of assault after entering a plea of guilty. In a subsequent civil suit, Special Term gave the guilty plea the same preclusive effect against the defendant as it would after a full trial. *Id.* See generally, Thau, *Collateral Estoppel and the Reliability of Criminal Determinations: Theoretical, Practical and Strategic Complications for Criminal and Civil Litigation*, 70 GEO. L.J. 1079 (1982).

383. 76 N.Y.2d 659, 564 N.E.2d 634, 563 N.Y.S.2d 24 (1990).

384. *D'Arata*, 76 N.Y.2d at 662, 564 N.E.2d at 635, 563 N.Y.S.2d at 25. Plaintiff Robert D'Arata was the party who was shot. The Court of Appeals referred to the claims of plaintiff Daren D'Arata, Robert's wife, as derivative. Thus the plaintiffs were, when necessary, collectively referred to as plaintiff. *Id.*



a jury trial of first degree assault arising out of the incident.<sup>385</sup> The insurance policy expressly excluded recovery for bodily injury "expected or intended by the Insured."<sup>386</sup> Thus, the issue before the Court was whether the insurer could use the insured's criminal judgment of conviction as a collateral bar to plaintiff's attempt in a civil case to re-litigate the issue of his assailant's intent to injure.<sup>387</sup> The Court of Appeals affirmed the appellate division and held that the plaintiff should be collaterally estopped and that the action, therefore, was properly dismissed.<sup>388</sup>

The initial question for the Court to determine was whether plaintiff, a nonparty to the prior criminal proceeding, should be bound by the adverse determination on intent in that proceeding. This required a finding that the plaintiff was in privity with his assailant. The Court pointed to Insurance Law section 3420(b)(1)<sup>389</sup> which permitted plaintiff to maintain a direct action against the insurer on the policy.<sup>390</sup> The Court explained that plaintiff was standing in the shoes of the insured and could have no greater rights than the insured. Thus, the inevitable consequence of plaintiff's election to proceed against defendant under the Insurance Law was that he was in legal privity with the claimed insured for the purpose of an issue preclusion analysis.<sup>391</sup>

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385. *Id.* (plaintiff, the complaining witness, testified for the prosecution in the criminal case).

386. *Id.*

387. N.Y. PENAL LAW § 120.10 (1) (McKinney 1987) states that a person is guilty of assault in the first degree when "[w]ith intent to cause serious physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument."

388. *See infra* notes 392-401.

389. *See* N.Y. INS. LAW § 3420 (McKinney Supp. 1990) which provides:

(b) . . . an action may be maintained by the following persons against the insurer upon any policy or contract of liability insurance . . . to recover the amount of a judgment against the insured . . . (1) any person . . . has obtained a judgment against the insured . . . for damages for injury sustained or loss or damage occasioned during the life of the policy or contract . . . .

390. *D'Arata*, 76 N.Y.2d 659, 564 N.E.2d 634, 563 N.Y.S.2d 24. The Court of Appeals observed that "plaintiff 'stands in the shoes' of the insured and can have no greater rights than the insured . . . [and] by proceeding directly against defendant, does so as subrogee of the insured's rights and is subject to whatever rules of estoppel would apply to the insured." *Id.* at 665, 564 N.E.2d at 637, 563 N.Y.S.2d at 27.

391. *Id.* ("Generally a nonparty to a prior litigation may be collaterally estopped by a determination in that litigation by having a relationship with a party to the prior litigation such that his own rights or obligations in the subsequent proceeding are conditioned in one way or another on, or derivative of, the rights of the party to the prior litigation.").

The next question for the Court of Appeals to determine was whether the two basic requirements for invoking the doctrine of issue preclusion had been satisfied.<sup>392</sup> The Court easily concluded that the "full and fair opportunity" requirement was satisfied because the insured had a jury trial which resulted in a verdict in which all of the elements of the crime, including intent, were necessarily proven against him.<sup>393</sup> The Court then addressed the more difficult question of whether the defendant had proven the requisite identity of the issue between the civil case and the prior criminal proceeding.<sup>394</sup> The Court explained that it must be shown by the moving party that the identical issue was necessarily decided in the first proceeding and is conclusive in the subsequent action.<sup>395</sup> In addition, the court stated that it must be shown that the issue was "actually litigated" in the first proceeding.<sup>396</sup> Plaintiff argued that the issue of the insured's intent was never contested in the first proceeding because the defenses at the trial were mistaken identification and alibi.<sup>397</sup> Furthermore, the insured had "simply defaulted as to that portion of the indictment that alleged the action was intentional."<sup>398</sup> The Court rejected this argument on the grounds that the jury had to be satisfied that the prosecution had met its burden of proving intent beyond a reasonable doubt or else there would not have been a guilty verdict.<sup>399</sup> The plaintiff also argued that issue preclusion should not be applied "based on general notions of fairness involving a practical inquiry into the realities of the litigation."<sup>400</sup> The Court rejected this argument on the policy ground of minimizing inconsistent judgments.<sup>401</sup>

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392. *Id.* ("We turn to the question of whether the two basic requirements for invoking collateral estoppel have been satisfied: (1) that the identical issue was necessarily decided in the prior proceeding and is decisive of the present action, and (2) that there was a full and fair opportunity to contest that issue in the prior proceeding.").

393. *See D'Arata*, 76 N.Y.2d 659, 564 N.E.2d 634, 563 N.Y.S.2d 24.

394. *See id.*

395. *Id.* (citing RESTATEMENT (SECOND) OF JUDGMENTS, § 27, comment c).

396. *Id.* Generally for "a question to have been actually litigated so as to satisfy the identity requirement it must have been properly raised by the pleadings or otherwise placed in issue and actually determined in the prior proceeding." *Halyalkar v. Board of Regents*, 72 N.Y.2d 261, 268, 527 N.E.2d 1222, 1226, 532 N.Y.S.2d 85, 89 (1988); *see also* RESTATEMENT (SECOND) OF JUDGMENTS, § 27, comments d & e.

397. *D'Arata*, 76 N.Y.2d at 667, 564 N.E.2d at 639, 563 N.Y.S.2d at 29.

398. *Id.*

399. *Id.*

400. *Id.*

401. *Id.* Indeed, it would be anomalous to permit plaintiff now to relitigate an issue

In *Sullivan v. Breese*,<sup>402</sup> the Appellate Division for the Second Department directly addressed the issue of whether issue preclusion effect should be given to a defendant's guilty plea in a subsequent civil suit.<sup>403</sup> The appellate division focused on whether re-litigation should be permitted in light of competing policy considerations.<sup>404</sup> These include fairness to the parties, conservation of the resources of the court and the litigants, and societal interests in consistent and accurate results.<sup>405</sup> The appellate division emphasized that these factors may vary in relative importance depending on the nature of the proceedings.<sup>406</sup> In *Sullivan*, the Second Department refused to apply issue preclusion because the stakes were so trivial that the defendant had no motivation to fully and vigorously litigate his criminal conviction.<sup>407</sup>

In *Allstate Insurance v. Zuk*,<sup>408</sup> the defendant pled guilty to second degree manslaughter for the death of Michael Smith. Subsequently, decedent's spouse brought a wrongful death action against defendant, who was insured by Allstate.<sup>409</sup> Allstate commenced an action for a declaratory judgment that it was not obliged to indemnify defendant because its policy coverage excluded any injuries resulting from the intentional acts of the insured party.<sup>410</sup> The appellate division held that defendant's guilty plea had conclusively established the issue of defendant's intent.<sup>411</sup> They applied the doctrine of issue preclusion and granted plaintiff's motion for summary judgment.<sup>412</sup> The *Zuk* decision is, arguably, distinguishable from *Sullivan* because of the seriousness of the second degree manslaughter charges that prompted Zuk to enter a guilty plea.

The Court of Appeals has granted leave to appeal in *Zuk*<sup>413</sup> and we will report its decision in next year's *Survey*. The Court will have

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which the jury has already determined under a higher standard of proof in the criminal case in which plaintiff, himself, gave evidence supporting the jury's finding.

402. 160 A.D.2d 997, 554 N.Y.S.2d 937 (2d Dep't 1990).

403. *Id.* at 997-98, 554 N.Y.S.2d at 937-38.

404. *Id.* at 998, 554 N.Y.S.2d at 938.

405. *Id.*

406. *Id.*

407. *Id.* at 999, 554 N.Y.S.2d at 939.

408. 160 A.D.2d 971, 972, 554 N.Y.S.2d 939, 940 (2d Dep't 1990).

409. *Id.*

410. *Id.*

411. *Id.* at 972-73, 554 N.Y.S.2d at 940.

412. *Id.* at 973, 554 N.Y.S.2d at 940.

413. 76 N.Y.2d 711, 565 N.E.2d 516, 563 N.Y.S.2d 767 (1990).

to determine the difficult question of whether the identity of issue requirement was met. In *D'Arata* the jury had to find intent to convict the defendant.<sup>414</sup> In *Zuk* there is the question of whether a guilty plea to manslaughter in the second degree involves intent.<sup>415</sup> To establish identity of issue, the party moving for invocation of issue preclusion must establish that Zuk did more than act recklessly when the underlying incident occurred.<sup>416</sup> The Court of Appeals must also face the policy issue of whether a future defendant will be reluctant to enter a guilty plea if he anticipates it will be used against him in a subsequent civil proceeding. It seems unlikely that Michael Milken would have pled guilty in federal court to six counts of conspiracy and fraud if he knew issue determinations necessary to his plea could later be used to conclusively establish liability against him in New York State civil litigation.<sup>417</sup>

## VII. SANCTION CASES, MANDATORY CONTINUING LEGAL EDUCATION, AND COMPULSORY PRO BONO

### A. Sanction Decisions

Last year's *Survey* discussed many of the recent sanction decisions which New York State trial courts issued pursuant to the new

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414. See *D'Arata*, 76 N.Y.2d 659, 564 N.E.2d 634, 563 N.Y.S.2d 24. Here, of course, in the criminal proceeding the People bore the burden of proving the defendant's intent to injure plaintiff (see N.Y. PENAL LAW § 120.10[1]). The issue of intent was necessarily submitted to the jury in the court's charge as a factual question on an essential element of the crime. *Id.* at 664, 564 N.E.2d at 637, 563 N.Y.S.2d at 27.

415. Zuk pleaded guilty to second degree manslaughter, which is an unintentional crime. See N.Y. PENAL LAW § 125 (McKinney 1990).

416. See *Zuk*, 160 A.D.2d at 972, 554 N.Y.S.2d at 940, where the appellate division held: "When Zuk pleaded guilty to manslaughter in the second degree in the criminal prosecution arising out of this incident, it was necessarily determined that the decedent's death was caused by Zuk's 'criminal act.'" Allstate submitted no proof that the result in this case was ever expected by the insured. Thus arguably the case falls within the "accident" rule of the decided cases. See *Miller v. Continental Ins. Co.*, 40 N.Y.2d 675, 358 N.E.2d 258, 389 N.Y.S.2d 565 (1976) (accidental death from intentional dose of heroin); *Wellisch v. John Hancock Mutual Life Ins. Co.*, 64 Misc. 2d 791, 316 N.Y.S.2d 722 (1970) (same); *Mansbacher v. Prudential Ins. Co.*, 273 N.Y. 140, 7 N.E.2d 18 (1937) (same); *Adlerblum v. Metropolitan Life Ins. Co.*, 284 N.Y. 695, 30 N.E.2d 728 (1940) (accidental death from reaction to novacaine intentionally administered for tonsillitis); *Gallagher v. Fidelity & Casualty Co.*, 163 A.D. 556, 148 N.Y.S. 1016 (2d Dep't 1914), *aff'd*, 221 N.Y. 664, 117 N.E. 1067 (1917) (accidental death from sunstroke while attempting to tan).

417. See *Adams, Defense Lawyers Surprised at Milken Sentence*, 204 N.Y.L.J. 100 (1990).

rules for frivolous litigation that became effective January 1, 1989.<sup>418</sup> During this *Survey* year, the Court of Appeals imposed sanctions for the first time under the new rules.<sup>419</sup> Several appellate divisions also issued sanction opinions,<sup>420</sup> and the U.S. Supreme Court ruled that sanctions could be awarded against a plaintiff who had voluntarily dismissed his complaint.<sup>421</sup>

In *Minister, Elders and Deacons of the Reformed Protestant Church of the City of New York v. 198 Broadway Inc.*,<sup>422</sup> the Court of Appeals, in a *per curiam* decision, imposed a \$2,500 sanction on an overly persistent litigant at the request of his adversary.<sup>423</sup> This was the first time the Court of Appeals applied Part 130 of the Uniform Rules for the New York State Trial Courts.<sup>424</sup> The respondent had made a series of motions<sup>425</sup> which the Court found to be "utterly without legal support"<sup>426</sup> and made for the sole purpose of delaying

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418. See Carlisle, *Civil Practice, 1989 Survey*, *supra* note 34, at 71-78.

419. See *Ministers, Elders, & Deacons of the Reformed Protestant Dutch Church of the City of N.Y. v. 198 Broadway, Inc.*, 76 N.Y.2d 411, 559 N.E.2d 429, 559 N.Y.S.2d 886 (1990); *John B. Bell v. New York Higher Educ. Assistance Corp.*, 76 N.Y.2d 930, 564 N.E.2d 664, 563 N.Y.S.2d 54 (1990); *Maroulis v. 64th St. — Third Ave. Assoc.*, 77 N.Y.2d 831, 567 N.E.2d 978, 566 N.Y.S.2d 584 (1991).

420. See *Hoefflich v. Chemical Bank*, 149 A.D.2d 341, 539 N.Y.S.2d 916 (1st Dep't 1989); see also *Strout Realty Inc. v. Mechta*, — A.D.2d —, 565 N.Y.S.2d 749 (2d Dep't 1991) (appeal so obviously lacking in merit that it was characterized as frivolous and Mechta was ordered to pay \$3,949 in costs and sanctions); *Grasso v. Matthew*, 164 A.D.2d 476, 564 N.Y.S.2d 576 (3d Dep't 1991) (imposing court costs and reasonable attorney's fees against attorney pursuant to CPLR 8303-a).

421. See *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990).

422. 76 N.Y.2d 411, 559 N.E.2d 429, 559 N.Y.S.2d 886 (1990).

423. *Ministers, Elders, & Deacons*, 76 N.Y.2d at 411, 559 N.E.2d at 429, 559 N.Y.S.2d at 886. The respondent, Modell, sought to renew its sublease but was denied right to do so because of the master tenant's decision not to renew the lease. The Appellate Division for the First Department awarded petitioner possession of the premises in 1982, and the Court of Appeals affirmed the appellate division order in 1983. The respondent then sought a declaratory judgment action based on a new legal theory, and filed an unsuccessful appeal to the Court of Appeals from an appellate division order dismissing that action. Thereafter respondent filed various other post-appeal motions with the Court of Appeals and two separate motions at the trial court to vacate the dispossession judgment upheld by the Court of Appeals. Finally respondent moved for an order recalling and amending the remittitur of the 1983 decision. The Court of Appelas, in imposing sanctions, dismissed Modell's motion as "plainly untimely," and noted that the time for making such motions had expired almost seven years before. *Id.*

424. *Id.*

425. *Id.* at 413, 559 N.E.2d at 430, 559 N.Y.S.2d at 867.

426. *Id.*

enforcement of an earlier judgment.<sup>427</sup> The Court of Appeals imposed sanctions for the second time in *John B. Bell v. The New York Higher Education Assistance*.<sup>428</sup> The Court granted respondent's motion for sanctions on the ground that appellant had filed a chain of motions which constituted a dilatory and frivolous avoidance of a 20-year old student loan debt.<sup>429</sup> The Court also found that appellant had failed to pay motion costs previously imposed by the Court of Appeals, and therefore imposed sanctions in the amount of \$1,000.<sup>430</sup> In both *Bell* and *Minister*, sanctions were imposed for misconduct occurring in both the lower courts and the Court of Appeals. The Court has yet to award sanctions simply for frivolous conduct in the courts below, nor has the Court imposed a \$2500 sanction on an attorney for frivolous litigation practices.<sup>431</sup>

In *Cooter & Gell v. Hartmarx*,<sup>432</sup> the U.S. Supreme Court was faced with three issues relating to the application of Rule 11 of the Federal Rules of Civil Procedure: first, whether a district court may impose Rule 11 sanctions on a plaintiff who has voluntarily dismissed his complaint pursuant to Rule 41(a)(1)(i);<sup>433</sup> second, what constitutes the appropriate standard of appellate review of a district court's imposition of Rule 11 sanctions;<sup>434</sup> and third, whether Rule 11 sanctions authorize awards of attorney fees incurred on appeal of a Rule 11 sanction.<sup>435</sup> The Supreme Court held that a voluntary Rule 41 dismissal did not deprive a district court of jurisdiction over a Rule 11 motion.<sup>436</sup> The Court also held that federal appellate courts should apply an abuse of discretion standard in reviewing all aspects of a

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427. *Ministers, Elders & Deacons*, 76 N.Y.2d at 413, 559 N.E.2d at 430, 559 N.Y.S.2d at 867.

428. 76 N.Y.2d 930, 564 N.E.2d 664, 563 N.Y.S.2d 54 (1990).

429. The Court of Appeals dismissed a motion for leave to appeal on the grounds that the orders appellant sought to appeal from were not final. The Court also granted respondent's motion for sanctions and noted that appellant had filed five motions "in a chain reflecting a strategy of dilatory, frivolous avoidance of a 20 year old student loan debt for two years' law school education." *Bell*, 76 N.Y.2d at 930, 565 N.E.2d at 664, 563 N.Y.S.2d at 54.

430. *Id.*

431. *See Maroulis*, 77 N.Y.2d 831, 567 N.E.2d 978, 556 N.Y.S.2d 584.

432. 110 S. Ct. 2447 (1990).

433. *Cooter & Gell*, 110 S.Ct. at 2449.

434. *Id.* at 2450.

435. *Id.* at 2451.

436. *Id.* at 2449. This view is consistent with Rule 11's purposes of deterring baseless filings and streamlining federal court procedure and is not contradicted by anything in that rule or Rule 41(a)(1)(i).

district court's decision in a Rule 11 proceeding.<sup>437</sup> Finally, the Supreme Court held that Rule 11 does not authorize a district court to award attorney's fees incurred on appeal.<sup>438</sup> The *Cooter* decision was followed by the U.S. Court of Appeals for the Second Circuit in *Mareno v. Rowe*.<sup>439</sup> The district court had imposed Rule 11 sanctions on Mareno for frivolously asserting jurisdiction over the defendant pursuant to the New York long arm statute.<sup>440</sup> The Circuit Court, with a strong dissenting opinion, found that the positions advanced by Mareno and his attorney were not so untenable as a matter of law as to necessitate sanction.<sup>441</sup> The Court held that the award of a \$4,800 sanction was inappropriate and failed to recognize the complexities of New York's long arm jurisprudence.<sup>442</sup>

Three appellate divisions issued instructive sanction opinions. In *Hoeflich v. Chemical Bank*<sup>443</sup> the First Department imposed a sanction of \$500 on the executor of an estate who had brought a frivolous motion to vacate an earlier order of the court.<sup>444</sup> In *Mechta v. Mack*<sup>445</sup> the Second Department imposed a \$1,000 sanction on a *pro se* plaintiff's attorney for his conduct in pursuing frivolous appeals

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437. *Id.* Petitioner argued that the Court of Appeals should have applied a three-tiered standard of review. This included a clearly erroneous standard for findings of historical fact, a *de novo* standard for the determination that counsel violated Rule 11, and an abuse of discretion standard for the choice of sanction. The Supreme Court rejected the petitioner's approach primarily on the ground that the Court of Appeals must defer to the district court's legal conclusions in Rule 11 proceedings.

438. *Cooter & Gell*, 110 S. Ct. at 2449. The Supreme Court held that neither the language of Rule 11's sanctions provisions, when read in connection with Rule 1's statement that the Rules only govern district court procedure, nor the Advisory Committee Note suggests that Rule 11 could require payment for appellate proceedings.

439. 910 F.2d 1043 (2d Cir. 1990).

440. *Mareno*, 910 F.2d at 1044. (Mareno argued that the defendants were amenable to suit under New York's corporate presence doctrine and under its long arm statute). See N.Y. CPLR 301, 302(a)(3).

441. 910 F.2d 1047. "There is no doubt that the arguments presented by Mareno were not persuasive. Nevertheless, to constitute a frivolous legal position for purposes of Rule 11 sanction, it must be clear under existing precedents that there is no chance of success and no reasonable argument to extend, modify or reverse the law as it stands." *Id.* (citations omitted).

442. *Id.* at 1047. The positions advanced by Mareno and his attorney, however faulty, were not so untenable as a matter of law as to necessitate sanction. Nor did they constitute the type of abuse of the adversary system that Rule 11 was designed to guard against. *Id.* at 1047.

443. 149 A.D.2d 341, 539 N.Y.S.2d 916 (1st Dep't 1989).

444. *Hoeflich*, 149 A.D.2d at 341, 539 N.Y.S.2d at 916-17.

445. 149 A.D.2d 747, 549 N.Y.S.2d 508 (2d Dep't 1989).

from two orders of the Supreme Court.<sup>446</sup> Mechta claimed at oral argument to have researched the issues relevant to the subject appeal and expended a total of two and a half days in preparing the appellate brief.<sup>447</sup> The Second Department held that even a cursory review of law in the area of defamation would have revealed that Mechta's action was totally devoid of legal merit.<sup>448</sup> The appellate division also found that Mechta's "conduct not only constituted a misuse of and a burden on judicial resources, but also placed a substantial burden on the defendants in time and costs associated with a defense of the appeal."<sup>449</sup> In *Grasso v. Mathew*,<sup>450</sup> the Third Department imposed sanctions under CPLR 8303-a against a Schenectady lawyer who filed a libel suit against the husband of his client in a divorce action.<sup>451</sup> The appellate division held that the husband's comments enjoyed an absolute privilege, and that the lawyer's defamation action was frivolous.<sup>452</sup>

On an issue of first impression in New York, a federal district court ordered an attorney to submit to remedial legal education in lieu of monetary sanctions pursuant to Federal Rule of Civil Procedure 11.<sup>453</sup> The district court, through a magistrate, found that plaintiffs' counsel had little litigation experience and that attorney ineptitude is not cured by high monetary penalties.<sup>454</sup> The magistrate concluded that the deterrent function of Rule 11 would be better served by a sanction tailored to improving the lawyers skills as a practicing attorney so that he would not make similar mistakes in the future.<sup>455</sup> The magistrate directed plaintiffs' counsel to attend a two day course in federal practice and procedure offered by one of the bar associations, or a one semester course in the same area at an accredited law school.<sup>456</sup>

Finally, the New York State Bar Association has recommended

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446. *Mechta*, 149 A.D.2d at 747, 549 N.Y.S.2d at 508.

447. *Id.*

448. *Id.*

449. *Id.*

450. 164 A.D.2d 476, 564 N.Y.S.2d 576 (3d Dep't 1991).

451. *Grasso*, 164 A.D.2d at 477, 564 N.Y.S.2d at 577.

452. *Id.* at 479-80, 564 N.Y.S.2d at 578-79.

453. *See Versailles Realty Co. v. Manufacturers Hanover Trust Co.*, 1190 WL 176727 (S.D.N.Y. 1990).

454. *Id.*

455. *Id.*

456. *Id.*



that there be significant amendments made to Part 130 of the Rules of the Chief Administrative Judge, which authorizes a fine of as much as \$10,000 for frivolous behavior.<sup>457</sup> A special committee, chaired by former Court of Appeals Judge Hugh R. Jones, submitted a report on March 20, 1990 which warns that the current rule may unnecessarily chill access to the New York State courts without preventing the conduct that actually causes needless expense and delay.<sup>458</sup> The Jones Committee also recommended that the rule's focus be changed from a ban on "frivolous" conduct to "abusive" conduct.<sup>459</sup> The State Legislature continues to oppose the new sanction rule.<sup>460</sup>

### *B. Mandatory Continuing Legal Education*

Last year's *Survey* discussed the arguments for and against mandatory continuing legal education ("CLE").<sup>461</sup> During the *Survey* year the House of Delegates of the New York State Bar Association adopted a resolution favoring the general concept of mandatory CLE.<sup>462</sup> Later, the House considered specific provisions of the proposed rule and suggested amendments.<sup>463</sup> After adopting certain amendments, the House endorsed a proposed rule.<sup>464</sup> The State Association is now proposing this rule for promulgation by the appropriate authority.<sup>465</sup> The rule provides for the appointment of a continuing legal education commission,<sup>466</sup> and requires every active attorney admitted and practicing in the state to complete eighteen hours of continuing legal education biennially, at least two hours of which shall

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457. See New York State Bar Association, REPORT OF SPECIAL COMMITTEE TO CONSIDER SANCTIONS FOR FRIVOLOUS LITIGATION IN NEW YORK STATE COURTS, March 20, 1990 [hereinafter BAR ASSOC. REPORT] (copy on file with the Syracuse Law Review).

458. *Id.* at 5-6.

459. *Id.*

460. *Id.* See also Spencer, *State Bar Seeks to Cut Fines from Lawyer Sanction Rules*, N.Y.L.J., April 12, 1990, p.1, col. 3.

461. See Carlisle, *Civil Practice, 1989 Survey*, *supra* note 34, at 78-82.

462. See Spencer, *Mandatory CLE Wins Approval of State Bar*, N.Y.L.J., Jan. 22, 1990, p.1, col. 5.

463. *Id.*

464. *Id.*

465. See generally Wise, *Lawyers Education: A Legislative Issue*, 203 N.Y.L.J. 51 (1990); Ostertag, *In Defense of MCLE*, N.Y.L.J., Mar. 16, 1990, at 1, col. 3; McKay, *MCLE: Try It, You May Like It*, N.Y.L.J., Jan. 17, 1990, at 2, col. 6.

466. See New York State Bar Association, DRAFT 4: Mandatory Continuing Legal Education For Attorneys (AS ADOPTED AT THE JUNE 22, 1990 HOUSE OF DELEGATES MEETING) (COPY ON FILE WITH THE SYRACUSE LAW REVIEW).

consist of education relating to professional responsibility and legal ethics.<sup>467</sup> All attorneys subject to the rule must, at the time of their biennial registration, report their participation in CLE activities during the preceding twenty-four months.<sup>468</sup> If an attorney fails to comply with the Rule, the CLE Commission will send a notice of delinquency to the attorney.<sup>469</sup> Within ninety days following receipt of the notice, the attorney must cure the delinquency or the matter will be referred to the appropriate appellate division of the supreme court for disciplinary action.<sup>470</sup> It is expected that the chief judge will implement the rule through the Judiciary Law so that noncompliance will constitute conduct prejudicial to the administration of justice and, thus, be subject to enforcement.

It should be noted that one-half of the proposed eighteen hour CLE requirement can be satisfied by videotape or in house CLE presentations. It is anticipated that the Chief Judge of the State of New York will implement the CLE rule in 1992 or 1993.

### C. *Compulsory Pro Bono*

Last year's *Survey* discussed the merits of mandatory pro bono ("MPB")<sup>471</sup> which has divided the bench and bar.<sup>472</sup> Chief Judge Wachtler appointed an advisory panel which proposed that all of New York's lawyers donate at least twenty hours of free legal time a year to pro bono projects.<sup>473</sup> After the proposal was submitted to Chief Judge Wachtler in early 1990, he gave the state and local bar associations two years to show whether a voluntary pro bono program could meet the legal needs of the poor.<sup>474</sup> The Chief Judge has also appointed a Pro Bono Review Committee to monitor how well the pro-

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467. *Id.* at 4-5.

468. *Id.* at 5-6.

469. *Id.*

470. *Id.* at 6-7.

471. *See* Carlisle, *Civil Practice, 1989 Survey, supra* note 34, at 82-84.

472. *Id.*

473. *Id.* *See also* New York State Bar Association, REPORT OF THE SPECIAL COMMITTEE TO REVIEW THE PROPOSED PLAN FOR MANDATORY PRO BONO SERVICE, October 16, 1989.

474. Adams, *Wachtler Defers Mandatory Pro Bono*, N.Y.L.J., May 2, 1990, at 1, col. 3. Chief Judge Wachtler gave the New York bar a two-year deadline to demonstrate that voluntary services could be sufficiently increased. If pro bono service "does not meet the desperate need [for legal services], I will propose . . . a rule be promulgated mandating pro bono services for the poor as recommended by the Marrero Committee." *Id.*

gram works.<sup>475</sup> The Committee plans to do some kind of objective survey.<sup>476</sup> The New York State Bar Association has proposed that the State Office of Court Administration require attorneys to report on their pro bono work as part of their biennial registration.<sup>477</sup> The New York County Lawyers Association and five other county bar groups have opposed any plan to survey lawyers or to require them to file reports regarding their pro bono contributions.<sup>478</sup>

### VIII. DISCLOSURE

There were several major disclosure decisions during the *Survey* year.<sup>479</sup> The U.S. Supreme Court ruled unanimously that universities and colleges charged with discrimination in tenure determinations must make relevant personnel files available to Federal investigators.<sup>480</sup> The New York Court of Appeals defined the parameters of discovery against corporations<sup>481</sup> and one appellate division issued important opinions regarding discovery access to surveillance photographs<sup>482</sup> and internal investigation for corporate clients.<sup>483</sup> A state trial court held that the medical records of family members of DES plaintiffs are discoverable<sup>484</sup> and another trial court ruled that a plaintiff may depose itself.<sup>485</sup> These and other decisions will be analyzed.

In *University of Pennsylvania v. Equal Employment Opportunity*

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475. Spencer, *Chief Judge Names Panel To Monitor Pro Bono Effort*, N.Y.L.J., Sept. 11, 1990, at 1, col. 3. Panelists to monitor the voluntary pro bono program are: Victor Marrero, Esq.; Justin Vigdor, Esq.; Joseph S. Genova, Esq.; and Robert Ostertag, Esq. The Committee will endeavor to determine how much time attorneys in New York devote to providing free civil legal services.

476. See Vol. 32, No. 5 State Bar News, *Wachtler Endorses Voluntary Pro Bono For 2 Years; Will Decide Then About Mandatory*, at 1, col. 3 (May 1990).

477. Spencer, *Pro Bono Reporting by Individuals Opposed*, N.Y.L.J., Sept. 26, 1990, at 1, col. 3. See generally, Dean, *Voluntary or Mandatory Service*, N.Y.L.J., May 21, 1990, at 3, col. 1.

478. *Id.*

479. See *infra* notes 480-511 and accompanying text.

480. *University of Pa. v. Equal Employment Opportunity Comm'n*, 110 S. Ct. 577 (1990).

481. See *Niesig v. Team I*, 76 N.Y.2d 363, 558 N.E.2d 1030, 558 N.Y.S.2d 493 (1990).

482. *Marte v. W.O. Hickok Mfg. Co.*, 154 A.D.2d 173, 552 N.Y.S.2d 297 (1st Dep't 1990).

483. *Spectrum Systems Int'l Corp. v. Chemical Bank*, 157 A.D.2d 444, 558 N.Y.S.2d 486 (1st Dep't 1990).

484. *Blank v. Eli Lilly & Co.*, N.Y.L.J., Aug. 31, 1990, at 1, col. —.

485. *Sigman-Weiss Consultants Inc. v. Raiff*, 149 Misc.2d 111, 563 N.Y.S.2d 618 (Civ. Ct., Kings Co. 1990).

*Commission*<sup>486</sup> an educator filed a discrimination complaint against a university with the Equal Employment Opportunity Commission.<sup>487</sup> The U.S. Supreme Court held that there was not a common law privilege against the disclosure of confidential peer review documents and that there was no first amendment right of "academic freedom" against the disclosure of the contested documents.<sup>488</sup>

Last year's *Survey* criticized the appellate division's decision in *Niesig v. Team I*.<sup>489</sup> We pointed out that the Second Department's presumption that all current employees are agents of a corporation contradicts the Court of Appeals' view as to the attorney-client relationship.<sup>490</sup> We also suggested that the *Niesig* opinion was contrary to the Court of Appeals' decision in *Rossi v. Blue Cross & Blue Shield*<sup>491</sup> and that it failed to provide adequate guidelines for corporate counsel who face serious conflict of interest problems. During the *Survey* year the Court of Appeals reversed the appellate division decision which had barred all *ex parte* communication with corporate employees.<sup>492</sup> The Court noted that the appellate division's ruling, which prohibited lawyers from interviewing a party without consent of the party's attorney, had the advantage of being clear but that it closed off avenues of informal discovery of information that may serve both the litigants and the entire justice system.<sup>493</sup> The Court of Appeals, speaking through Judge Kaye, adopted an "alter ego" test which defines a party to include only corporate employees whose acts or omissions are binding on the corporation or imputed to the corporation for purposes of its liability, or to employees who are deemed to be implementing the advice of counsel.<sup>494</sup> The Court held that all other employees may be interviewed informally.<sup>495</sup> Judge Bellacosa concurred and pointed out that the "alter ego" definition will function almost identically with the rejected "blanket preclusion" definition used by the appellate division.<sup>496</sup> Judge Bellacosa suggested that par-

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486. 110 S. Ct. 557 (1990).

487. *University of Pa.*, 110 S. Ct. at 580.

488. *Id.* at 588-89.

489. See Carlisle, *Civil Practice*, 1989 *Survey*, *supra* note 34, at 111-12 (criticizing *Neisig*).

490. *Id.*

491. 73 N.Y.2d 588, 540 N.E.2d 703, 542 N.Y.S.2d 508 (1989).

492. *Niesig*, 76 N.Y.2d at 376, 558 N.E.2d at 1036, 559 N.Y.S.2d at 499.

493. *Id.* at 372, 558 N.E.2d at 1034, 559 N.Y.S.2d at 497.

494. *Id.* at 374, 558 N.E.2d at 1035, 559 N.Y.S.2d at 498.

495. *Id.*

496. *Id.* at 376, 558 N.E.2d at 1036-37, 559 N.Y.S.2d at 499-500.

ties should be limited to a "control group" of only those corporate employees who are among the most senior management who exercise substantial control over the corporation.<sup>497</sup> Judge Bellacosa also emphasized that attorney-client communications are unaffected by the Court of Appeals holding in the *Niesig* case.<sup>498</sup>

In *Marte v. W.O. Hickol Manufacturing*,<sup>499</sup> the First Department held that the plaintiff was entitled to the discovery of surveillance videos taken in a personal injury action.<sup>500</sup> The appellate division rested its decision on the grounds that the plaintiff should be given an opportunity to challenge the accuracy of the tapes prior to trial. Nonetheless, the appellate division held that it is permissible to delay the surveillance disclosure until after the defendant has had a full opportunity to depose the plaintiff.<sup>501</sup> Thus, the testimony may be preserved for impeachment purposes at trial. In *Spectrum Systems International v. Chemical Bank*,<sup>502</sup> the First Department affirmed a lower court's decision that documents prepared by a law firm for a bank in the course of an investigation into allegations of fraud were not protected by the attorney-client privilege.<sup>503</sup> The appellate division reasoned that since the role of the law firm was that of an investigator retained to develop facts rather than to render legal opinions, their work product was not exempt from discovery.<sup>504</sup> The First Department also noted that to qualify as "litigation" material under CPLR 3101(d)(2), documents must be prepared primarily, if not solely, for litigation.<sup>505</sup> In another interesting decision, the Appellate Division for the Fourth Department held that CPLR 3117(a)(2)<sup>506</sup> does not apply when an adverse party seeks to use a deposed employee's deposition if the employer is no longer a party to the action.<sup>507</sup>

In *Blank v. Eli Lilly*,<sup>508</sup> Justice Ira Gammernan was asked to

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497. *Niesig*, 76 N.Y.2d at 376, 558 N.E.2d at 1036-37, 559 N.Y.S.2d at 499-500.

498. *Id.* at 378, 558 N.E.2d at 1037, 559 N.Y.S.2d at 500.

499. 154 A.D.2d 173, 552 N.Y.S.2d 297 (1st Dep't 1990).

500. *Marte*, 154 A.D.2d at 177, 552 N.Y.S.2d at 300.

501. *Id.*

502. 157 A.D.2d 444, 558 N.Y.S.2d 486 (1st Dep't 1990).

503. *Spectrum Systems*, 157 A.D.2d at 448, 558 N.Y.S.2d at 488.

504. *Id.*

505. *Id.*

506. *State University Construction Fund v. Kipphut & Newmann Co., Inc.*, 159 A.D.2d 1003, 1005, 552 N.Y.S.2d 471, 473 (4th Dep't 1990).

507. *Id.*

508. 204 N.Y.L.J. 45, Sept. 4, 1990, at 23 col. 4 (Sup. Ct. N.Y. Co. 1990).

determine if plaintiffs' family members' records were discoverable. Justice Gammernan rejected the plaintiff's contention that the discovery of medical records of their mothers, fathers, siblings and other family members was covered by the physician-patient privilege.<sup>509</sup> In *Sigman-Weiss Consultants v. Raiff*,<sup>510</sup> Justice Spodek held that the plaintiff in a fraud suit had the right to take its own deposition to be used if the defendant, a man in poor health, expired before trial. The deposition the plaintiff sought to take was one of its own partners who claimed to have had conversations about the contested matter with the defendant.<sup>511</sup>

## IX. PLEADINGS AND MOTIONS, VENUE AND APPEALS

### A. Pleadings and Motions

In *Ministers, Elders & Deacons of the Reformed Protestant Dutch Church of the City of New York*,<sup>512</sup> the Court of Appeals for the first time imposed sanctions under newly enacted Part 130 of the Uniform Rules of the Court against a litigant for frivolous motion practice.<sup>513</sup> The Court defined a motion as frivolous if it is completely without merit in law or fact and cannot be supported by any reasonable argument for an extension, modification or reversal of existing law.<sup>514</sup> In this respect, the practitioner is reminded that he must assert a jurisdictional defense in his CPLR 3211 motion or it will be waived.<sup>515</sup> Similarly, if the defense is not asserted by motion or answer, it usually cannot be asserted in an amended answer.<sup>516</sup> On the other hand, if there is no merit to the defense, the practitioner may face sanctions for filing a frivolous pleading.<sup>517</sup> On a similar tack, a notice defect is waived if not raised in an answer or by motion.<sup>518</sup> Also, an attempt to

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509. *Id.*

510. 149 Misc.2d 111, 563 N.Y.S.2d 618 (Sup. Ct., Kings Co. 1990).

511. *Sigman-Weiss*, 149 Misc. 2d at 112, 563 N.Y.S.2d at 619.

512. 76 N.Y.2d 411, 559 N.E.2d 429, 559 N.Y.S.2d 866 (1990).

513. *Ministers, Elders & Deacons*, 76 N.Y.2d at 413, 559 N.E.2d at 430, 559 N.Y.S.2d at 867.

514. *Id.* at 414, 559 N.E.2d at 430, 559 N.Y.S.2d at 867.

515. See Carlisle, *Civil Practice, 1989 Survey*, *supra* note 34, at 98 (citing *Addesso v. Shemtob*, 70 N.Y.2d 689, 512 N.E.2d 314, 518 N.Y.S.2d 793 (1987)).

516. *Id.*

517. *Id.*

518. See *Sandoval v. New York*, 147 Misc. 2d 1072, 559 N.Y.S.2d 115 (Ct. of Claims 1990).

amend a complaint, without leave of court, is a nullity.<sup>519</sup>

The Appellate Division for the Second Department, in an issue of first impression, has ruled that a civil plaintiff's case should not be summarily dismissed after his attorney's opening statement unless the lawyer is given an opportunity to correct the deficiency.<sup>520</sup> Thus if an opening statement fails to make out a prima facie case, the attorney for the plaintiff should be given an opportunity to correct any deficiency in the opening.

In *Sheridan v. Citicorp North America*,<sup>521</sup> petitioner sought to vacate respondent's execution with notice to the garnishee. The trial court held that petitioner merely presented an affidavit and obtained an order to show cause on it. Thus, instead of commencing a special proceeding, he brought on a mere practice motion. This meant that the court could not deem the papers to be pleadings and had to dismiss the case. In *Jimenez v. Chasis*,<sup>522</sup> the trial court dismissed a legal malpractice case because when the suit was begun the underlying action commenced on plaintiff's behalf was not yet terminated. The court held the suit was premature and noted that premature commencement of actions unnecessarily overburdened the court.<sup>523</sup>

### B. Venue and Appeals

The most significant venue case decided during the *Survey* year is the U.S. Supreme Court's decision in *Ferens v. John Deere*.<sup>524</sup> The Court held that the law of the transferor forum applies when a diversity suit is transferred under 28 U.S.C. section 1404(a),<sup>525</sup> regardless of who initiates the transfer. A Pennsylvania farmer lost his hand when it became caught in a combine harvester made by the defendant. Subsequent to the expiration of the Pennsylvania tort statute of limitations, plaintiff filed contract and warranty claims in a Pennsylvania federal court. He later filed a tort suit in federal court in Mississippi because that state had a six-year tort limitations period. He then moved to transfer that suit to federal court in Pennsylvania and retain the benefit of the Mississippi statute of limitations law. The U.S.

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519. See *Eustace v. Club Med*, 204 N.Y.L.J. 98 (Sup. Ct., N.Y. Co. 1990).

520. *Devito v. Katsch*, 157 A.D.2d 413, 556 N.Y.S.2d 649 (2d Dep't 1990).

521. 204 N.Y.L.J. 36 (Nassau Co., Sup. Ct. 1990).

522. N.Y.L.J., July 19, 1990, at 24 col. 3 (Sup. Ct. N.Y. Co. 1990).

523. *Id.*

524. 110 S. Ct. 1274 (1990).

525. See 28 U.S.C. § 1404(a) (1988).

Supreme Court held that section 1404(a) transfers should not create or increase forum shopping opportunities and that such transfers should turn on considerations of convenience and the interest of justice, rather than the possible prejudice resulting from a change of law.<sup>526</sup> Thus the court held that any reward for the plaintiff's manipulateness is less repugnant than requiring suits in two forums.<sup>527</sup> Justice Scalia, joined by Justices Brennan, Marshall and Blackmun dissented on the grounds that the court's rule would allow plaintiffs to use the accident of diversity to obtain the application of a different law within the state where they litigate, contravening the intent behind *Erie Railroad v. Tomkins*.<sup>528</sup>

The bar should be alert to the desire of the Court of Appeals to encourage motions for *amicus curiae* relief. These motions must comply with the general rules governing motions in the Court of Appeals, specifically Court of Appeals Rule 500.11 [a], [b], [c], and [f].<sup>529</sup> They are also subject to specific rules set forth in section 500.11[e].<sup>530</sup> In 1989 the Court of Appeals granted 78 of 99 motions for leave to file an amicus brief.<sup>531</sup>

## X. MISCELLANEOUS

During 1990 *Survey* year, some decisions and other items of interest emerged that merit mentioning.

### A. *Opting Out of Class Actions*

In *Woodrow v. Colt Industries*,<sup>532</sup> the Court of Appeals considered whether a Missouri corporation with no ties to New York had a due process constitutional right to opt out of a New York class action in which the relief sought was largely equitable in nature. The Court held that when a class action complaint demands predominantly equitable relief that will necessarily benefit the class as a whole if granted, the trial judge is not required to give class members the opportunity

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526. *Ferens*, 110 S. Ct. at 1282.

527. *Id.* at 1284.

528. 304 U.S. 64 (1938).

529. See Rule 500.11 [a], [b], [c] and [f] of the Court of Appeals Rules.

530. *Id.*, Rule 500.11 [e].*Id.*

531. See 1989 Annual Report of the Clerk of the Court of Appeals (on file with Syracuse Law Review).

532. 77 N.Y.2d 185, 566 N.E.2d 1160, 565 N.Y.S.2d 755 (1990).



to opt out of the class.<sup>533</sup>

### B. Law School Dismissals

Last year's *Survey* mentioned *In re Susan "M"*,<sup>534</sup> where the Appellate Division for the First Department reversed a dismissal of petitioner's Article 78 proceeding on the grounds that law schools owe students some kinds of safeguard against the possibility of arbitrary or capricious error in grading exams before expelling students for academic deficiency. During the *Survey* year, the Court of Appeals ruled unanimously not to add grading law school exams to its functions.<sup>535</sup> Judge Alexander, speaking for the Court, held that a professor's evaluation of a law student's performance is beyond the scope of judicial review unless the challenged determination was arbitrary and capricious, irrational and made in bad faith, or contrary to constitution or statute.<sup>536</sup>

### C. Arbitration Clauses

In *Cowen & Co. v. Anderson*,<sup>537</sup> the Court of Appeals ruled that a standard arbitration clause in an agreement between Cowen & Co. and an investor allowed the investor to take his complaint to the American Arbitration Association.<sup>538</sup>

### D. Legal Malpractice Claims

In *Campagnola v. Mulholland, Minion & Roe*,<sup>539</sup> the Court of Appeals held that a law firm may not offset any malpractice award to its former client by the amount it would have received as a contingency fee for the personal injury action.<sup>540</sup> Judge Kaye, who concurred in the 4 to 3 decision, limited the holding to four essential facts<sup>541</sup> and thus left open the possibility that under different circumstances an offset would be proper.<sup>542</sup>

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533. *Woodrow*, 77 N.Y.2d at 195, 566 N.E.2d at 1165, 565 N.Y.S.2d at 760.

534. 76 N.Y.2d 241, 556 N.E.2d 1104, 557 N.Y.S.2d 297 (1990).

535. *Susan "M"*, 76 N.Y.2d at 243, 556 N.E.2d at 1105, 557 N.Y.S.2d at 298.

536. *Id.* at 246, 556 N.E.2d at 1107, 557 N.Y.S.2d at 300.

537. 76 N.Y.2d 318, 558 N.E.2d 27, 559 N.Y.S.2d 225 (1990).

538. *Cowen & Co.*, 76 N.Y.2d at 322, 558 N.E.2d at 29, 559 N.Y.S.2d at 227.

539. 76 N.Y.2d 38, 555 N.E.2d 611, 556 N.Y.S.2d 239 (1990).

540. *Campagnola*, 76 N.Y.2d at 39, 555 N.E.2d at 611, 556 N.Y.S.2d at 239.

541. *Id.* at 45, 555 N.E.2d at 615, 556 N.Y.S.2d at 243.

542. *Id.* at 46-47, 555 N.E.2d at 616, 556 N.Y.S.2d at 244.

*E. Emotional Distress: First Appellate Ruling on Injury*

In *Lavanant v. General Accident Insurance Company of America*,<sup>543</sup> the Appellate Division for the First Department unanimously ruled that where an insurance policy defines bodily injury as including sickness or disease, the scope of coverage includes the emotional and psychological effects of traumatic incidents covered by the policy. Justice Sullivan, writing for the court, referred to cases from other jurisdictions and stated that the First Department agreed with the conclusions of those courts that expanded the scope of bodily injury beyond physical harm.<sup>544</sup>

*F. Contingency Fees*

In *Beatie v. Delong*,<sup>545</sup> the Appellate Division for the First Department held that an attorney's contingency fee based on a percentage of revenues generated by patents that the attorney recovered for his client was not improper.<sup>546</sup>

*G. Claims by Terminated Law Firm Partners*

A law firm partner who refused to change his "nine-to-five lifestyle" to conform with the rigorous demands of his firm had his claims summarily dismissed on the grounds that he would be unable to prove that he was wrongfully terminated from the firm.<sup>547</sup> Also, terminated law firm partners who seek damages under ERISA and RICO claims can expect to have a summary judgment motion granted against them.<sup>548</sup>

*H. Law School Enrollments and Bar Examinations*

Despite a weak economy, law school applications and enrollments continue to increase.<sup>549</sup> Also, of the record 7,285 candidates who took the July 24-25, 1990 state bar examination, 5,099 — or 70 percent — passed the exam. The 70 percent pass rate is touted as a

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543. 164 A.D.2d 73, 561 N.Y.S.2d 164 (1st Dep't 1990).

544. *Lavanant*, 164 A.D. at 79-80, 561 N.Y.S.2d at 168.

545. 164 A.D.2d 104, 561 N.Y.S.2d 448 (1st Dep't 1990).

546. *Beatie*, 164 A.D.2d at 109, 561 N.Y.S.2d at 451.

547. *See Reid v. Bickel*, 1990 U.S. Dist. LEXIS 16451 (S.D.N.Y. 1990).

548. *Clapp v. Greene*, 743 F. Supp. 273, 277 (S.D.N.Y. 1990).

549. *Adams, Local Law Schools Recent Rise in Applications*, N.Y.L.J., Oct. 31, 1990, at 1, col. 3.

record high.<sup>550</sup>

### *I. Small Claims Court Not Bound by Formal Procedure*

In *Rahman v. Elite Car & Limo Service*,<sup>551</sup> the Civil Court of New York denied defendant's summary judgment motion and held that section 1804 of the Civil Court Act gave the Small Claims Court great latitude to ignore procedural law in order to do substantial justice between the parties.

### *J. Special Masters*

For many years the New York County Bar Association has selected voluntary special masters to assist Supreme Court judges in Manhattan. In *Schwartz v. Stecher Jaglom & Prutzman*,<sup>552</sup> plaintiff moved to disqualify defendant's counsel because a member of his firm served as a special master in Supreme Court.<sup>553</sup> Plaintiff claimed a conflict of interest existed that should have been disclosed.<sup>554</sup> Justice Baer found that special masters did not determine cases but were limited to discovery disputes and recommendations which the courts were not bound to follow.<sup>555</sup> Justice Baer stated that the special masters provide able help to a vastly overburdened Court and reminded the bench and bar that "[m]embership in the bar is not supposed to be simply a means to acquire wealth; it is also about service to the public good and the fair administration of justice."<sup>556</sup>

## X. CONCLUSION

We are again grateful for the helpful comments and suggestions from our colleagues of the bench and bar and in academia. I am particularly thankful to the 1991 graduating classes of the Pace University School of Law and the Fordham University School of Law for keeping me ever alert to new developments in New York Civil Practice.

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550. *Record 70% Pass State Bar Examination*, N.Y.L.J., Nov. 8, 1990, at 1, col.6.

551. N.Y.L.J., Aug. 2, 1990, at 20, col. 5.

552. N.Y.L.J., Nov. 15, 1990, at 22, col. 1.

553. *Id.*

554. *Id.*

555. *Id.*

556. *Id.*